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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 21, 1945.

CERTIORARI GRANTED OCTOBER 15, 1945.

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On April 12, 1944, there was filed in open Court the indictment in the words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, APRIL TERM THEREOF, A. D. 1943, HELD AT MIAMI, FLORIDA.

UNITED STATES OF AMERICA

vs.

STANLEY HOWITT, FLORA POST LEE AND JAMES F. DEWHURST.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Southern District of Florida, upon their oaths present:

1. That at all times herein mentioned the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railway Company, the Pennsylvania Railroad Company and other railway companies, were corporations, common carriers subject to the provisions of the Act of Congress of February 4, 1887, as amended, commonly known as the Interstate Commerce Act, and engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, Florida, and points without the State of Florida, over jointly established through routes.

2. That at all times herein mentioned the Pullman Company was a corporation, a common carrier, engaged in the operation of sleeping cars upon and over the lines of said railroad companies, and was also subject to the provisions of said Act of Congress.

3. That at all times herein mentioned lawful and regularly established rates for transportation of passengers and for Pullman Company sleeping car accommodations from Miami, Florida, to points within and without the State of Florida over jointly established through routes over the lines of said railroad companies were in effect, said lawful rates having been established by schedules or tariffs duly printed, published and filed by said carriers with the Interstate Commerce Commission, as required by law.

4. That at all times herein mentioned Stanley Howitt and James F. Dewhurst were persons acting for and employed by said Florida East Coast Railway Company, to-wit, ticket sellers in the ticket office of the said Railway Company in the City of Miami, Florida, and acted for said common carriers in the sale to the general public of railroad tickets and tickets for Pullman Company sleeping car accommodations between Miami, Florida, and points on the lines of said carries within and without the State of Florida.

5. That at all times herein mentioned Flora Post Lee was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a diagram clerk, whose duty it was to record reservations of space upon diagrams of passenger railroad cars, and to inform ticket sellers upon inquiry as to available space in such cars.

6. That at all times herein mentioned David Curry, Albert Lee Smith, Morris J. Goldberg, Albert D. Deverich and Elliott Elkin were superintendents of service at resort hotels on Miami Beach, Florida, and were active in endeavoring to secure coach seat reservations and Pullman reservations on passenger trains of said railroad companies departing from Miami for points outside of said State of Florida for the guests of said hotel.

7. That heretofore, to-wit, commencing on the 15th day of December, A. D. 1943, and continuously thereafter up to and including the 4th day of March, 1944, the exact time being more particularly to the grand jurors unknown, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, said Stanley Howitt, Flora Post Lee and James F. Dewhurst, who are herein named defendants, well knowing the premises aforesaid, did unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together and with other persons to the grand jurors unknown, to commit certain offenses against the United States of America, that is to say:

(A) That the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, while acting as such employees and for said carriers as aforesaid, would collect and receive unjust and unreasonable charges for services rendered and to be rendered in the transportation of passengers over said railroad companies, in violation of Section 1 of the Act of Congress of February 4, 1887, as amended, known as the Interstate Commerce Act.

(B) That the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, while acting as such employees aforesaid and for said common carriers as aforesaid, would collect and receive from certain persons a greater compensation for services rendered and to be rendered in the transportation of passengers, subject to the provisions of the Act of Congress of February 4, 1887, as amended, known as the Interstate Commerce Act, than they would collect and receive from other persons for doing for such other persons a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in violation of Section 2 of said Act.

(C) That the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, while acting as such employees aforesaid and for said common carriers as aforesaid, would unlawfully make and give undue preferences or advantages to particular persons and would subject particular persons to undue prejudice and diadvantage, in violation of Section 3 of the Act of Congress known as the Interstate Commerce Act approved February 4, 1887, as amended.

(D) That the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, while acting as such employees aforesaid and for said common carriers as aforesaid, would collect and receive a greater and different compensation for transportation of passengers between Miami, Florida, and points without the State of Florida, than the rates, fares and charges specified in tariffs filed with the Interstate Commerce Commission and in effect at the time, in violation of Section 6 of the Act of Congress, approved February 4, 1887, known as the Interstate Commerce Act.

For a more particular description of the object and purposes of said conspiracy and of the methods and means whereby the parties thereto expected and intended to accomplish its objects and purposes, the grand jurors, upon their oaths aforesaid, do further present:

That during the time herein mentioned the passenger trains of said railroad companies departing from Miami, Florida, for points throughout the United States were loaded to capacity, and the number of passengers seeking space in reserved coach seats and Pullman cars far exceeded the capacity of the available cars; hundreds of persons were daily unable to obtain such accommodations or to make reservations, which condition was brought about and attributable to the war and a heavy tourist season in the Miami, Florida, area, all of which the defendants well knew.

That numerous persons, particularly superintendents of service at resort hotels in the Miami area, such as the said David Curry, Albert Lee Smith, Morris J. Goldberg, Albert D. Deverick and Elliott Elkin, hereinafter sometimes called said hotel employees, were willing to pay said defendants sums of money in excess of the lawfully established rates for Pullman car space and reserved coach seats in order to obtain preferences for guests of their respective hotels, and the defendants, while acting as said railroad employees as aforesaid, were in a position to furnish such Pullman car space and coach seats and to make and give undue preference and advantage to persons willing to pay the said defendants sums in excess of the lawfully established tariff for such accommodations and to thereby subject other persons to undue prejudice and disadvantage.

That the defendants, well knowing the premises aforesaid, did conspire together and with other persons to the grand jury unknown, to make available to the said hotel employees for use by guests of said hotels coach seats and Pullman reservations, which but for the payment of money to the said defendants by said hotel employees in excess of the tariff rates would have been available to the general public on a just and equal basis.

That the said defendants did conspire as aforesaid to collect and receive and accept from the said hotel employees sums of money for said reservations in excess of the lawfully established rates and to make and give to the said hotel employees undue preferences and advantages in the distribution of available space on said railroad trains and to subject others to undue prejudice and disadvantage.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of said conspiracy, combination, confederation and agreement and for the purpose of effecting the object thereof, the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, did do and commit the following overt acts:

1. That on, to-wit, the 23rd day of December, A. D. 1943, at Miami, Florida, James F. Dewhurst accepted from David Curry an envelope containing $5.00 in currency of the United States and delivered said envelope and currency to Flora Post Lee.

2. That heretofore, to-wit, on the 28th day of December, A. D. 1943, at Miami, Florida, the same James F. Dewhurst at the request of David Curry did call said Flora Post Lee to come down from the diagram room on the second floor of the ticket office of the Florida East Coast Railway depot to the first floor of the said depot for the purpose of meeting David Curry, at which time the said Flora Post Lee accepted from David Curry the sum of $20.00.

3. That heretofore, to-wit, on the 1st day of January, A. D. 1944, at Miami, Florida, the exact date being more particularly unknown to the grand jurors, James F. Dewhurst had a conversation with David Curry and told the said David Curry that the said David Curry would have to pay him in excess of the lawfully established rates for space on said railroad trains and informed the said David Curry that he, the same James F. Dewhurst, had to take care of someone in the diagram room.

4. That on the 22nd day of February, A. D. 1944, at Miami, Florida, Flora Post Lee and Stanley Howitt visited the Arlington Hotel at Miami Beach, Florida, where the said Stanley Howitt delivered to David Curry a coach seat identification check for a reservation on a railroad train

of said common carrier, a better description of which is to the grand jury unknown, and Flora Post Lee accepted $20.00 from said David Curry.

5. That heretofore, to-wit, on the 25th day of February, A. D. 1944, at Miami, Florida, Flora Post Lee and Stanley Howitt made an appointment with Morris J. Goldberg to meet the said Morris J. Goldberg at the residence of Flora Post Lee at 2268 Southwest Second Street, Miami, Florida.

6. That on, to-wit, the 15th day of February, A. D. 1944, at the residence of Flora Post Lee the said Flora Post Lee and Stanley Howitt made an arrangement with Albert Lee Smith that the said Albert Lee Smith should contact Flora Post Lee at her said residence by telephone at night for the purpose of applying for and obtaining reservations for coach seats and Pullman space on the passenger trains of said carriers through the said Flora Post Lee and Stanley Howitt.

7. That heretofore, to-wit, on the 2nd day of March, A. D. 1944, at 4:30 o'clock P. M., Flora Post Lee and Stanley Howitt visited Albert Lee Smith at the Triton Hotel at Miami Beach, Florida, where said Albert Lee Smith worked as superintendent of service, and discussed the matter of passenger reservations of space on railroad trains.

8. That on, to-wit, the 10th day of February, A. D. 1944, at Miami, Florida, Stanley Howitt sold to Elliott Elkin, superintendent of service at the Crest Hotel, Miami Beach, Florida, for use of Mr. and Mrs. Merson of 617 St. Paul Street, Baltimore, Maryland, space in a Pullman car, to-wit, upper and lower berth No. 6 in car F-73, on a train known as the Champion, scheduled to depart from Miami, Florida, at 8:15 A. M. daily, Pullman stubs 1454 and 2601, for which he, the said Stanley Howitt charged $5.00 in excess of the regularly and lawfully established tariff rate for said accommodations.

9. That heretofore, to-wit, on the 15th day of March, A. D. 1944, at Miami, Florida, Stanley Howitt sold to Albert D. Deverich, superintendent of service at the South Seas Hotel, Miami Beach, Florida, a bedroom in a Pullman car, to-wit, room "A", car F-120, on a train scheduled to leave at 9:00 o'clock P. M. daily from Miami, Florida, to New York, New York, Pullman form 300-4, serial No. 2231, for use by guests at said hotel, Mrs. Rosalind Diener and daughter, of 12805 Shaker Boulevard, Cleveland, Ohio, and did charge for said space $10.00 in excess of the lawfully established rate.

10. That heretofore, to-wit, on the 17th day of February, A. D. 1944, at Miami, Florida, Stanley Howitt delivered to Elliott Elkin four coach seats reservations for David Osmonsky of Norwalk, Connecticut, from Miami, Florida, to New York, New York, on a train known as the Champion, scheduled to depart at 7:30 A. M. on February 19, 1944, for which the said David Osmonsky paid $40.00, of which sum the said Stanley Howitt accepted $20.00, when no charge was made by the railroad companies for said seat reservations, price thereof being included in the established fare.

Contrary to the form of the statute in such case made and provided (Title 18, U. S. C. 88) and against the peace and dignity of the United States of America.

(Sgd.) ERNEST L. DUHAIME,
Asst. United States Attorney.

A True Bill.

(Sgd.) ROYCE CHALMERS,
Foreman.

Filed in open Court this 12th day of April, A. D. 1944. Edwin R. Williams, Clerk, by (Sgd.) Earle F. Sprigg, Deputy Clerk.

On April 14, 1944, there was filed defendants' Demurrer to Indictment in the words and figures as follows:

9 DEMURRER TO INDICTMENT.

In the District Court of the United States of America, in and for the Southern District of Florida, Miami Division.

United States of America,
vs. 6399-M-Cr.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

Now Come the above named defendants, by their attorneys, Riley & Dressler, and demur to the indictment herein, and each and every count thereof, jointly and severally, and for grounds of demurrer say:

1. That under the statutes of the United States, (Title 49. U. S. Code, Sections 2 and 10, and other related statutes, contained in the Act of February 4, 1887, Ch. 104, Part 1, Sec. 2, 24 Stat. 379; Act of February 28, 1920, Ch. 91, Sec. 404, 41 Stat. 479; Act of June 19, 1934, Ch. 652, Sec. 602 (b), 48, Stat. 1102; Act of August 9, 1935, Ch. 498, Sec. 1, 49 Stat. 543), the criminal acts therein set forth apply solely to common carriers, or shippers, or their agents, acting for such common carriers, within the scope of the agents' employment; and that the indictment herein fails to allege that the common carrier or common carriers had committed an offense under the statutes in question, and that the defendant or defendants were aiders, abettors, accomplices and accessories of the common carrier or carriers described in the indictment.

2. That under Chapter 2, Sec. 41, (2), covering liability of corporation carriers and agents, and offenses and penalties, it is provided: "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, Acting Within the

Scope of His Employment, shall in every case be also deemed to be the act, omission or failure of such carrier or shipper as well as that of the person", and the indictment fails to allege (a) an offense committed by a common carrier, and (b) that the acts alleged to have been done by the defendants mentioned in the indictment, were in the course of their employment by the carrier, and that when committing such acts, the defendants were acting within the scope of their employment.

3. Under the statutes, as well as the proper, legal interpretation thereof, unless the indictment alleges a common carrier guilty as principal, the carrier's agents or employees cannot be charged with or be found guilty of a violation of the act, in that the offenses described in the statute covering the offenses attempted to be alleged in the indictment, can only be committed by a class, viz. common carriers, or employees or agents, acting within the scope of their employment.

4. The indictment shows that the accused acted without their employment, in trespass against their employer, and for the sole benefit of the accused; and that their acts attach no criminality to the carrier, and without the carrier being charged with and found guilty as principal, the accused cannot be charged with or found guilty, as agents, employees, aiders, abettors, or accomplices.

5. The statutes upon which the indictment is based, and related statutes covering transportation in interstate commerce do not bring within the statutes, the acts set forth in the indictment, and "Laws which create crime ought to be so explicit that all men subject to their penalties may know what * * * to avoid, and before a man can be punished his case must be plainly and unmistakably within the statute."

6. That the indictment is based upon Sections 2 and 10 of Chapter 1 of Title 49, U. S. Code, and that Section 41 of Chapter 2 of said Title 49 states:

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committeed by such corporation."

and that subdivision 2 of said section 41 states:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, Acting Within the Scope of His Employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

and that the indictment fails to allege that the accused were acting within the scope of their employment; and the said indictment fails to proceed against the common carrier, as principal, referred to in said indictment.

Wherefore, these defendants say that said indictment and each and every count thereof charges no offense under the statutes of the United States, and that these defendants should go hence without day.

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendants.

State of Florida,
County of Dade, ss.

Bart. A. Riley, being duly sworn, deposes and says that he is of counsel in the above entitled case; that the foregoing demurrer is not interposed for the purpose of delay; that the foregoing demurrer is well founded in point of law.

(Sgd.) BART. A. RILEY.

Sworn to and subscribed before me this 14th day of April, A. D. 1944.

(Sgd.) SALLY HORNREICH,
(Notarial Seal) Notary Public, State of Florida at Large.

My commission expires Mar. 13, 1947.

On May 17, 1944 there was filed an opinion of the Court overruling defendants' demurrer in the words and figures as follows:

12 OPINION.

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America,
v. No. 6399-M-Crim.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

Defendants have demurred to the indictment returned against them, which demurrer was argued before the Court on Saturday, May 13, 1944, and taken under advisement.

The contention of the defendants is that the Act is aimed at railroads as principals, with the agents, servants, officers, etc., (if a crime is committed by the principal) acting as aiders and abettors, and unless the railroad gets the benefit of the over-charge, the ticket agent cannot be prosecuted because then, he, the agent, is a trespasser, an embezzler, or violator of some other State law. Stated differently, the objection is that the indictment does not specify facts from which it might be found that the carriers are guilty of the offense charged, and that under the Interstate Commerce Act of 1887, as amended, defendants cannot commit an offense except as aiders and abettors. Defendants claim that they cannot be guilty as aiders and abettors, and that no crime is specified against the carrier.

Consideration of the case is facilitated by the historical note following Section 10, 49 U. S. C. A., as prepared by the publishers of United States Code Annotated. Section 10 as originally enacted is quoted verbatim. This is followed by the additional provisions enacted in 1889. In Section 2 of the original Interstate Commerce Act of 1887 special rates and rebates are prohibited, and the granting of same is deemed unjust discrimination, and declared to be unlawful. Section 10 deals with violations and penalties. By original Section 10 any director, officer, receiver, trustee, lessee, agent, or person acting for or employed by a corporation carrier are brought within the purview of the penalty provisions of the Act. Section 10 has been judicially construed not to include the corporation carrier itself; In re Peasley, 44 F. 271, 275, and Toledo etc. Ry. Co. v. Pennsylvania Co., 54 F. 730, 736, and the provisions of the Elkins and Hepburn Acts, passed in 1903 and 1906, (U. S. C. 49, Sec. 41) dealing with the liability of corporation carriers and agents, would indicate legislative approval was given to this judicial consideration. My own thought is that "common carrier" as used

in Section 10 included both corporate and non-corporate carriers, but I accept this judicial and legislative interpretation as a foreclosure of this question in my consideration of this case.

Considering original Section 10, and the use of the words "agent or persons acting for, or employed by, such corporation" I differ with the construction of these words as was placed by the District Court in United States v. Tozer, 37 F. 637, decided in 1889. Judge Taft in writing the opinion in Toledo etc. Ry. Co. v. Pennsylvania Co., 54 F. 730, text 736, had some doubts about the interpretation of these words as embracing the employee of the carrier. My own thought is that Section 10 by use of the indicated words intended to include such employees when they were managing officers, or managing agents, in the sense of vice-principalship. In the Toledo case, supra, the carrier was seeking an injunction against one Arthur and others, and it was held that every locomotive engineer of the defendant carrier is a "person employed by" a common carrier corporation subject to the provisions of the Interstate Commerce law. If this view is accepted, it is controlling in this case, and we could stop here with an overruling of the demurrer.

While there is judicial authority for accepting the conclusion that the ticket seller acting within the scope of his employment is a person employed by the carrier, that conclusion does not satisfy my reading of the Act. This is a statutory violation charged, and I first raise the question as to who was intended as a possible aider and abettor, and next ponder the question of the guilt of defendants as principals under 18 U. S. C. A. Sec. 550. In my judgment aiders and abettors contemplated shippers, and with all reason could be said to include employees of the carrier. Aiding and abetting is by the statute made a substantive offense. It would seem that shippers who

aided or abetted were included in the original Act since false billing by a shipper was introduced only by a proviso, and made false billing by a shipper punishable with fine and imprisonment, whereas the penalty under the 1887 Act was only by fine. In other words, shippers were not first brought within the purview of the Act by the 1889 amendment, but in my judgment they were within the provisions of the aiding and abetting provision of the original Act. And if shippers were contemplated as possible aiders and abettors, I see no reason why employees of the carrier could not likewise be regarded as having been within the proper interpretation of aiders and abettors.

While I do not accept the doctrine announced by the Tozer decision, and as supported by the Toledo Railway case approving in this respect the Tozer decision as to "persons employed", I inquire whether the ticket agent could be included within the provisions of Section 10 as an aider and abettor, and responsible as a principal under 18 U. S. C. A. Sec. 550. On principle I think that he can. The amendment of 1889 emphasizes three classes of offenders, (a) the person within the provisions of the Act; (b) a carrier within the provisions of the Act, and (c) a shipper. In principle I see no reason why a ticket agent, who is charged in the indictment committed the act which constitutes the unlawful discrimination, may not be guilty as a principal under 18 U. S. C. A. 550. The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime. But this is a statutory violation and scienter is not here so important. The carrier as a principal may not have participated in commission of the act charged in the indictment by direction or authorization, or it may have been committed without the knowledge or consent of the officers, or managers, or vice principals, exercising mana-

gerial control, but the act charged in the indictment to have been committed by the ticket agent in and of itself constitutes discrimination, which was made unlawful by the Commerce Act. Where both the principal and the aider are persons, the hard and fast rule of law is recognized requiring the commission of the offense by the principal, without which the aider could not be guilty. True it is that the aider may be separately indicted and separately tried as a principal. Collins v. United States, 20 F. (2) 574, 578, and cases cited. There is some authority also which goes to the extent of the sustaining of a conviction of the aider though the principal was found not guilty. Rooney v. United States, 203 F. 928. That question is not here for discussion in this case. In principle I recognize the doctrine above generally stated. In the case of a carrier, a corporation, as principal, discrimination under the statute by an employee, ticket agent; is possible, though the carrier may not have participated in the unlawful profits, and may not be chargeable with knowledge through some official or vice principal. The ticket agent in such case may be prosecuted under the statute as a principal, the crime of aiding and abetting being by the statute made a substantive offense. It follows that as an aider and abettor under the statute, the ticket agent is a principal and not an accessory. On authority this conclusion is fortified by the Toledo case, supra, text 737.

Defendants rely upon United States v. Peterson, 1 F. (2) 1018, in which case the defendant as an employee was charged with discrimination under the statute, but on consideration of the attack upon the indictment it appeared by stipulation that the defendant embezzled and sold the tickets. I consider this case as not contrary to United States v. Estes, 6 F. (2) 902, relied upon by the Government. But as stated herein, I base my decision not on the reasoning of the Tozer case, supra, but upon the aider and abettor as a principal rule.

The demurrer in this case should be overruled, and order may be presented.

At Miami, Florida, this 17th day of May, 1944.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On May 20, 1944 there was filed an order overruling demurrer of the defendants in the words and figures following:

16 ORDER.

In the United States District Court in and for the Southern District of Florida, Miami Division.

United States of America,
vs. No. 6399-M-Criminal.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

This cause coming on to be heard before me on a Demurrer addressed to the indictment in said cause and on a Motion for Bill of Particulars and the oral argument of counsel having been heard and the briefs submitted in support thereof, and the Court having entered its formal opinion with the Clerk of the Court, it is thereupon

Ordered and Adjudged that the Demurrer be and the same is hereby overruled. It is further

Ordered and Adjudged that the Motion for Bill of Particulars be and the same is hereby denied.

Done and Ordered at Miami, Florida, this the 20th day of May, A. D. 1944.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On January 16, 1945 there was filed Plea in Bar in words and figures as follows:

17 PLEA IN BAR.

In the District Court of the United States of America in and for the Southern District of Florida, April Term Thereof, A. D. 1944, Held at Miami, Florida.

United States of America
vs. No. 6399-M. Criminal.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

Now Come The Above Named Defendants, by Riley & Dressler, their attorneys, and respectfully show unto the Court that this plea in bar is based upon the Acts of Congress dated respectively February 11, 1893, chapter 83, 27 Stat. 443, and the Act of Congress dated February 25, 1903, chapter 755, Section 1, 32 Stat. 904, which said statutes are set forth in Sections 46 and 47, Title 49-Transportation, United States Code 1940 Edition (copies of which are attached hereto) as well as upon the opinion of the United States Supreme Court in the case of United States of America vs. William F. Monia, 317 U. S. 424 to 447, 87 L. Ed. 376; and 18 USCA, Section 595, and the Act of June 18, 1934, chapter 595, 48 Stat. 1008 5 USCA, Section 300a authorizing the acts of officers of the Federal Bureau of Investigation.

2. That criminal offenses, arising under said Title 49, are prosecuted by the United States Department of Justice, and that the Federal Bureau of Investigation is a department of and subject to the rules and orders of the Department of Justice, and that agents of said Federal Bureau of Investigation, lawfully acting for said Department of Justice, produced evidence from these defendants, which was used by said Department of Justice in the framing of the indictment against these defendants, and

sent to Miami for presentation to the Grand Jury, in a criminal proceeding growing out of an alleged violation of Chapter 1, Title 49, U. S. Code, as hereinafter set forth.

3. That on March 3, 1944, there was a criminal proceedings instituted by the Federal Bureau of Investigation pending against the above named defendants, before United States Commissioner Roger C. Davis of Miami, Florida, and on said date warrants for the arrest of these defendants had been issued and delivered to agents of the Federal Bureau of Investigation by said United States Commissioner, which said warrants were based upon and grew out of alleged violations of Chapter 1, Sec. 10, Subsection 1, Title 49-Transportation, United States Code 1940 Edition, commonly known as the Interstate Commerce Act.

4. That on the 4th day of March, 1944, the local officers of the Federal Bureau of Investigation were situated in the Biscayne Building on Flagler Street near Miami Avenue in the city of Miami, Florida; that on said date the office of the United States Commissioner Davis was situated in the Shoreland Arcade Building on Flagler Street near First Avenue, Miami, Florida, although all hearings before the United States Commissioner were held by him on the second floor of the Post Office Building situated on North East First Avenue and Third Street, Miami, Florida. That on the said 4th day of March, 1944, the said United States Commissioner went to the offices of the Federal Bureau of Investigation and remained there during the greater portion of the day in order to be available to the Federal Bureau of Investigation agents after these defendants were taken into custody.

5. That on said 4th day of March, 1944, agents of the Federal Bureau of Investigation, in said cause and proceedings then pending before said United States Commis-

sioner, did separately go to the offices of the Florida East Coast Railroad Company in Miami, Florida, and did separately exhibit to each one of the defendants, credentials showing that each of said agents were agents of the Federal Bureau of Investigation, and did thereupon separately ask each one of the defendants to come down to the offices of the Federal Bureau of Investigation in the Biscayne Building, Mian., Florida; that although warrants had been issued and were in the possession of said agents of the Federal Bureau of Investigation, at the time that they first spoke to these three defendants at the Florida East Coast Railroad Company office, yet such warrants were not exhibited to or served upon any of these defendants nor were the said defendants notified that they were under arrest; that in regard to the defendant Lee one agent conveyed her down to the offices of the Federal Bureau of Investigation; that in regard to the defendants Howitt and Dewhurst, two agents of the Federal Bureau of Investigation conveyed them down to the offices of the Federal Bureau of Investigation in said Biscayne Building, Miami, Florida.

6. That when each of said defendants were so taken by the agents of the Federal Bureau of Investigation down to the Biscayne Building and without the knowledge of the other defendants, each defendant was taken into a separate office of the said Federal Bureau of Investigation and interrogated by said agents for the period of time set opposite each defendant's name, to-wit: Howitt for four (4) hours; Lee for five (5) hours and Dewhurst for five (5) hours; that during such investigation none of said defendants were taken before the United States Commissioner who was then and there in one of the offices of the Federal Bureau of Investigation, and available to the said agents of the Federal Bureau of Investigation.

7. Said agents, however, in their capacity aforesaid, and upon their own initiative, interrogated said defendants as aforesaid for the periods of time hereinbefore alleged and at the conclusion of said interrogation they announced to each of the defendants that it was necessary for them to sign a statement containing a synopsis of said interrogation which had been prepared by the agents of the Federal Bureau of Investigation. As a result of said examination said statements were signed by defendants and constitute legal confessions. That said statements related to all the matters and things set forth in the indictment thereafter filed in this case; and that all of such evidence produced by said defendants before said agents constitute proof of a violation of offenses set forth in Chapter 1, Title 49-Transportation—United States Code 1940 Edition and particularly Sections 2 and 10 of said Chapter 1 which is commonly known as the Interstate Commerce Act.

8. That none of the said defendants came to the offices of the said Federal Bureau of Investigation on said March 4, 1944, voluntarily but were brought to said offices by the said agents as hereinbefore alleged.

9. That after the interrogation of each of these defendants was completed and after they had signed a statement as aforesaid they were then informed that warrants had been issued for their arrest for violating the above referred to sections of the Interstate Commerce Act and thereupon each defendant separately was taken to the temporary office of the United States Commissioner, in the offices of the Federal Bureau of Investigation, being first served with a warrant for their arrest after they had signed said statements, and were arraigned before the said United States Commissioner who then and there fixed bail in the sum of Five Hundred Dollars

($500.00) each for defendants Howitt and Dewhurst and permitted the defendant Lee to be released upon her own recognizance.

10. That within a week following said arraignment of said defendants and their release as aforesaid by bail or recognizance on March 4, 1944, the said agents brought the defendants Howitt and Dewhurst again down to the offices of the Federal Bureau of Investigation and interrogated each of said defendants for a long period of time, "in order to clear up matters which had not been included in the written statements of March 4, 1944" and that said agents did request Miss Lee during said period of time to again come to their office in the Biscayne Building and she refused; that thereupon said agents went to the home of Miss Lee and interrogated her again for a long time for the same purpose for which they interrogated the defendants Howitt and Dewhurst; and during the second interrogation of these defendants the said agents of the Federal Bureau of Investigation asked them if they would agree to have their homes searched and each of said defendants so agreed but that the said agents did not search the homes of the defendants but did search the home of one Terrance P. O'Rourke, who also stands indicted in this Court for a violation of the Interstate Commerce Act, and who was also interviewed and arrested by said agents of the Bureau of Federal Investigation who used the same procedure in regard to O'Rourke that they used in regard to these defendants, and therefore caused the defendants to produce evidence against themselves.

1. That there is attached hereto a copy of Sections 46 and 47 of Title 49-Transportation—United States Code 1940 and these defendants say that the criminal proceedings therein stated is a cause and proceedings based upon and growing out of any alleged violation of Chapter 1 of said Title 49; and that in said Section 46 it is provided

that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify in such criminal proceedings, and that it is further provided in Section 47 of said Title 49 that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning, which he may testify or produce evidence, documentary or otherwise, in any proceedings, suit or prosecution under Chapter 1 of this Title or any law amendatory thereof or supplemental thereto; that these defendants produced evidence by signing confessions and producing further evidence against themselves.

12. And these defendants state that growing out of such said production of evidence they were thereafter indicted in this Court for conspiracy to violate the provisions of the Act of Congress of February 4, 1897 as amended, known as the Interstate Commerce Act and for conspiracy to violate Sections 2, 3 and 6 of said Act of Congress known as the Interstate Commerce Act, and that their trial on said indictment is set for January 29, 1945, in this Court, and that they file this plea in abatement at this time so that the plea, if it is demurred to by the government or a replication thereto is filed, can be disposed of by the Court in ample time to save the Government great expense in the transportation of many witnesses from other distant states in the Union, in the event said plea is sustained and that the said defendants in filing the plea at this time and having the same passed upon by the Court are not delaying, or seeking to delay the trial of the case as set for January 29, 1945.

13. These defendants say that by reason of the matters and things hereinbefore set forth in this plea, these defendants are not and should not be subject to prosecution on said indictment now pending against them, but

that said indictment should be dismissed and the defendants discharged. And each of these defendants so prays, in bar.

(Sgd.) BART. A. RILEY,
Of the law firm of Riley & Dressler.

United States of America,
State of Florida,
County of Dade.

Stanley Howitt, Flora Post Lee and James F. Dewhurst, being duly sworn, say that the matters and things set forth in the foregoing plea are true.

(Sgd.) STANLEY HOWITT,
(Sgd.) FLORA POST LEE,
(Sgd.) JAMES F. DEWHURST.

Subscribed and Sworn to before me this 16th day of January, 1945.

(Sgd.) J. H. BRINSON.
(Notarial Seal) Notary Public, State of Florida at Large.

My Commission expires, June 16, 1945.

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23 CERTIFICATE.

I, A. C. Dressler, of counsel for defendants, do hereby certify that the foregoing plea is well founded in point of law.

(Sgd.) A. C. DRESSLER,
Of the law firm of Riley & Dressler.

Sections 46 and 47 of Title 49-Transportation, U. S. Code 1940 Edition is as follows:

Section 46. Self-Criminating Testimony; Perjury; Refusal to Testify.

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause of proceedings, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceedings; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a Court of competent jurisdiction shall be punished by fine not less than $100.00 nor more than $5,000.00, or by imprisonment for not more than one year or by both such fine and imprisonment. (Feb. 11, 1893, ch. 83, 27 Stat. 443.)

Cross Reference.

Immunity of this section as extending only to natural person who, in obedience to a subpoena, gives testimony

under oath or produces evidence under oath, see section 48 of this title.

Section 47. Immunity of Witness from Prosecution: Perjury..

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under chapter 1 of this title or any law amendatory thereof or supplemental thereto; Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (Feb. 25, 1903, ch. 755, section 1, 32 Stat. 904.)

On January 17, 1945, there was filed by the attorneys for the defendants an instrument, relating to said plea in bar in the words and figures as follows:

In the District Court of the United States of America, in and for the Southern District of Florida. April Term, A. D. 1944. Held at Miami, Florida.

26 United States of America,
vs. No. 6399-M-Criminal.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

Now Come the above named defendants, by Bart A. Riley and A. C. Dressler, their attorneys, and respectfully represent unto the Court that in addition to the statutes cited and quoted as a part of the plea in bar filed by these defendants in the above entitled cause, Section 48, Title 49-Transportation, United State Code 1940 Edition

is also before the Court under said plea in bar, for the purpose of interpretation of said statute as applied to the facts shown in said plea in bar.

(Sgd.) BART A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendants.

On January 18, 1945, there was filed a demurrer of United States of America to the plea in bar in the words and figures as follows:

27 DEMURRER.

In the United States District Court in and for the Southern District of Florida, Miami Division.

United States of America,
vs. No. 6399-M-Criminal.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

Comes now the United States of America by its undersigned attorneys and demurs to the plea in abatement as filed by the defendants in the above entitled cause for the following reasons:

1. That it affirmatively appears from the allegations as set forth in the said plea that the defendants do not come within the purview of Sections 46, 47 or 48 of Title 49, United States Code, nor are they entitled to immunity from prosecution under said indictment now pending before this Court.

2. That is affirmatively appears under the allegations as set forth in the said plea that the defendants did not in

obedience to any subpoena whatsoever give testimony under oath or produce evidence, documentary or otherwise, under oath and that under Section 48 of Title 49, United States Code, they are not immune from prosecution.

3. That it affirmatively appears from the allegations as set forth in said plea that the said defendants did not appear before the Interstate Commerce Commission to testify or give evidence in any criminal cause based upon any alleged violation of Chapter 1 of Title 49, United States Code.

4. That it affirmatively appears from the allegations as set forth in the said plea that the said defendants did not testify before the Federal Grand Jury, which returned the indictment now pending against them in this Court.

5. That it affirmatively appears from the allegations as set forth in the said plea that the said defendants at the time they were interviewed by the agents of the Federal Bureau of Investigation did so voluntarily and that at said time they did not seek immunity nor were they promised immunity.

6. It affirmatively appears from the allegations as set forth in said plea that neither of the defendants entertained any idea at the time they were interviewed by the agents of the Federal Bureau of Investigation that they were to be the beneficiaries of any immunity and that this plea in abatement and its possibilities were suggested, prepared and filed by their attorney approximately eleven months after their interview with the agents of the Federal Bureau of Investigation.

(Sgd.) HERBERT S. PHILIPS,
United States Attorney.

(Sgd.) ERNEST L. DUHAIME,
Asst. United States Attorney.

On January 20, 1945 there was filed an order sustaining demurrer of the government to the plea in bar in the words and figures as follows:

29 ORDER.

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America,
v. No. 6399-M-Criminal.
Stanley Howitt, Flora Post Lee and James F. Dewhurst.

The demurrer to the plea in bar, which plea was filed January, 16, 1945, should be sustained for the following reasons:

The plea is based on Sections 46 and 47 U. S. C. 49, upon United States v. Monia, 317 U. S. 424; 18 U. S. C. Sec. 595 and 5 U. S. C. 300a. The defendants had not been arrested prior to the matters asserted in said plea. The immunity provisions in Sections 46 and 47 supra, under 49 U. S. C. Sec. 48, extend only to the defendants who, in obedience to a subpoena, give testimony under oath. It should further be observed that before arrest, although warrants had been issued by the commissioner, the matters set up in said plea were not developed in any proceeding, suit or prosecution. The fact that there were warrants had not been made known to the defendants. To prosecute a suit is, according to the common acceptation of language, to continue a demand which has been made by the institution of process in a Court of justice. Cohens & Commonwealth of Virginia, 19 U. S. 264. A prosecution is the act of conducting or waging a proceeding in Court. State v. Bowles, 70 Pac. (Kan.) 726. Possession of warrants of arrest by agents of the Federal Bureau of

Investigation, authorized to serve same, does not serve to render that which was done by the agents as set up in this plea, before arrest, a part of a proceeding, suit or prosecution in my judgment.

The demurrer to the plea is sustained.

Done and Ordered at Miami, Florida, this the 20th day of January, 1945.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On April 12, 1944, there was filed in open Court an indictment in the words and figures as follows:

In the District Court of the United States of America in and for the Southern District of Florida, April Term Thereof, A. D. 1943, Held at Miami, Florida:

31 United States of America
vs. 6400-M-Cr.
Terence P. O'Rourke.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Southern District of Florida, upon their oaths present:

1. That at all times in this indictment mentioned, the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company and the Richmond, Fredericksburg and Potomac Railway Company were corporations and common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, in the State of Florida, a point on the railway lines of said Florida East Cast Railway Company, over a

jointly established through route, and Washington, in the District of Columbia, a point on the railway line of said Richmond, Fredericksburg and Potomac Railway Company, said common carriers being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned the Pullman Company was a corporation, a sleeping-car company common carrier, engaged in the operation of sleeping cars upon and over the lines of said railway companies and was also subject to the provisions of said Act, as amended.

3. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies and said Pullman Company in the sale of passenger tickets and Pullman Company tickets for space on said sleeping cars.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for a lower berth from Miami, Florida, to Washington, in the District of Columbia, including tax, was $10.56, said lawful rate for said sleeping car accommodations of the said Pullman Company having been established by schedules or tariffs duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said commission and in force and effect at all times herein mentioned.

5. That heretofore, to-wit, on the 26th day of February, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction

of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did, unlawfully, wilfully and knowingly collect and receive from one Joel Weiss a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of said Act of Congress than said carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to said Joel Weiss a ticket for sleeping car accommodations, to-wit, a lower berth, No. 6 in car 72, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to Washington, in the District of Columbia, for which said sleeping car accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $25.00, which said sum of $25.00, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10) and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That each and every of the allegations contained in Paragraphs numbered 1, 2, 3 and 4 of the First Count of this indictment are incorporated in and made a part of

this Court of this indictment the same as though set forth herein in full.

5. That heretofore, to-wit, on the 26th day of February, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity as such employee of said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and different compensation for transportation of passengers and for service in connection therewith between Miami, Florida, and Washington, District of Columbia, named in the tariffs aforesaid than the rates, fares and charges specified in said tariffs filed and in effect at the time, in that he, the said Terence P. O'Rourke, did furnish and sell to one Joel Weiss a ticket for sleeping car accommodations to-wit, a lower berth, No. 6 in car 72, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to Washington, District of Columbia, for which said sleeping car accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $25.00, which said sum of $25.00, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations in tariffs filed and in effect at the time as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 6. Sub-section 7) and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

1. That at all times in this indictment mentioned the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredricksburg and Potomac Railway Company and the Pennsylvania Railroad Company were corporations and common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, in the State of Florida, a point on the railway lines of said Florida East Coast Railway Company, over a jointly established through route, and New York, in the State of New York, a point on the railway line of said Pennsylvania Railroad Company, said common carriers being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned the Pullman Company was a corporation, a sleeping-car company common carrier engaged in the operation of sleeping cars upon and over the lines of said railroad companies, and was also subject to the provisions of the said Act as amended.

3. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller, and was acting for said railroad companies and said Pullman Company in the sale of passenger tickets and Pullman Company tickets for space on said sleeping cars.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for an upper berth from Miami, Florida, to Washington, in the District of Columbia, including tax, was $8.03, said lawful rate for said sleeping car accommodations of the said Pullman Company having been established by schedule or tariff duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said Commission and in force and effect at all times herein mentioned.

5. That at all times herein mentioned the lawful and regularly established joint through rate of fare of said railroad companies for the transportation of passengers, first class, from Miami, Florida, to New York, New York, including tax was $50.09, said lawful rate of fare having been established by tariffs or schedules duly printed, published and filed by said railroad companies with the Interstate Commerce Commission, as required by law, and were on file with said Commission and in force and effect at all times herein mentioned.

6. That heretofore, to-wit, on the 3rd day of March, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court Terence P. O'Rourke, while acting in his said capacity as such employee of said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive from one Zacheus Johnson a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of the said Act of Congress than the said carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circum-

stances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to said Zacheus Johnson tickets for two upper berths, the numbers of which and a more particular description of which are to the grand jurors unknown, in a Pullman car then and there being operated by the said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to New York, New York, and did furnish and sell to said Zacheus Johnson two first-class railroad tickets for transportation of passengers from Miami, Florida, to New York, New York, over said joint through route, for which said sleeping car accommodations and first-class railroad tickets the said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $136.24, which said sum of $136.24, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations and transportation as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10) and against the peace and dignity of the United States of America.

Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That each and every of the allegations contained in paragraphs numbered 1, 2 and 3 of the Third Count of this indictment are incorporated in and made a part of this Count of this Iindictment the same as though set forth herein in full.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for an upper berth from Miami, Florida, to Washington, Dis-

trict of Columbia, including tax, was $8.03, said lawful rate for said sleeping car accommodations of the said Pullman Company having been established by schedule or tariff duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said Commission and in force and effect at all times herein mentioned.

5. That at all times herein mentioned the lawful and regularly established rate of said railroad companies for first class railroad fare from Miami, Florida, to New York, New York, including tax, was $50.09, said lawful rate for said transportation over said railroads having been established by schedules or tariffs, duly printed, published and filed by said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said Commission and in force and effect at all times herein mentioned.

6. That, heretofore, to-wit, on the 4th day of March, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court Terence P. O'Rourke, while acting in his said capacity as such employee of said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and different compensation for transportation of passengers and for services in connection therewith between Miami, Florida, and New York, New York, being points named in said tariffs filed, published and in effect as aforesaid, than the rates, fares and charges specified in said tariffs in that he, the said Terence P. O'Rourke, did furnish and sell to one Zacheus Johnson two tickets for sleeping car accommodations, to-wit, two upper berths, the numbers of which and a more particular description of which are to the grand jurors unknown, in a Pullman car then and there being operated by said Pull-

man Company over the lines of said railroad companies and over said through route from Miami, Florida, to Washington, District of Columbia, and did sell to the said Zacheus Johnson two first class railroad tickets for transportation of passengers from Miami, Florida, to New York, New York, over said through route for which said sleeping car accommodations and for which said railroad tickets the said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $136.24, which said sum of $136.24, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations and for said railroad tickets as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 6) and against the peace and dignity of the United States of America.

Fifth Count.

And the grand jurors aforesaid, upon their oaths aforesaid do further present:

1. That at all times in this indictment mentioned the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railway Company and the Pennsylvania Railroad Company, were corporations and common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, in the State of Florida, a point on the railway lines of said Florida East Coast Railway Company, a jointly established through route, and New York, New York, a point on the railway line of said Pennsylvania Railroad Company, said common carriers being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned the Pullman Company was a corporation, a sleeping-car company common carrier, engaged in the operation of sleeping cars upon and over the lines of said railway companies and was also subject to the provisions of said Act as amended.

3. That at all times herein mentioned Terence P O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies and said Pullman Company in the sale of passenger tickets and Pullman Company tickets for space on said sleeping cars.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for a drawing room from Miami, Florida, to New York, New York, including tax, was $31.19, said lawful rate for said sleeping car accommodations of the said Pullman Company having been established by schedules or tariffs duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law; and were on file with said commission and in force and effect at all times herein mentioned.

5. That heretofore, to-wit, on the 3rd day of March, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive from a person, to-wit, Mr. Halsey, a better description of whom is to the grand jurors unknown, a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of said Act of Congress than said

carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to said Mr. Halsey a ticket for drawing room accommodations, to-wit, No. A in car F-48, ticket No. 489, train No. 8, scheduled to depart from Miami, Florida, at 8:15 A. M. daily, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to New York, New York, for which said drawing room accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $131.19, which said sum of $131.19, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10) and against the peace and dignity of the United States of America.

Sixth Count.

And the grand jurors aforesaid, upon their oaths aforesaid do further present:

That each and every of the allegations contained in paragraphs 1, 2, 3 and 4 of the fifth count of this indictment are incorporated and made a part of this count of this indictment the same as though set forth herein in full.

5. That heretofore, to-wit, on the 3rd day of March, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said ca-

pacity as such employee of said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and different compensation for transportation of passengers and for service in connection therewith between Miami, Florida, and New York, New York, named in the tariffs aforesaid, than the rates, fares and charges specified in said tariffs filed and in effect at the time, in that he, the said Terence P. O'Rourke, did furnish and sell to one Mr. Halsey, a better description of whom is to the grand jurors unknown, a ticket for drawing room reservations, to-wit, No. A in car F-48, ticket No. 489, train No. 8, scheduled to depart from Miami, Florida, at 8:15 A. M. daily, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to New York, New York, for which said drawing room accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $131.19, which said sum of $131.19, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations in tariffs filed and in effect at the time as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 6, Sub-section 7) and against the peace and dignity of the United States of America.

Seventh Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

1. That at all times in this indictment mentioned, the Florida East Coast Railway Company, the Atlantic Coast

Line Railroad Company, the Central of Georgia Railway Company, the Louisville and Nashville Railway Company and the Pennsylvania Railroad Company were common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, Florida, a point on the railway lines of said Florida East Coast Railway Company, over a jointly established through route, and Chicago, in the State of Illinois, a point on the railway line of said Pennsylvania Railroad Company, said common carriers being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned the Pullman Company was a corporation, a sleeping-car company common carrier, engaged in the operation of sleeping cars upon and over the lines of said railway companies and was also subject to the provisions of said Act as amended.

3. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies and said Pullman Company in the sale of passenger tickets and Pullman Company tickets for space on said sleeping cars.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for a drawing room from Miami, Florida, to Chicago, Illinois, including tax, was $45.76, said lawful rate for said drawing room accommodations of the said Pullman Company having been established by schedules or tariffs duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law,

and were on file with said Commision and in force and effect at all times herein mentioned.

5. That heretofore, to-wit, on the 24th day of February, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive from a person, to-wit, William Gerhard Balz, a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of said Act of Congress than said carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to said William Gerhard Balz drawing room accommodations, to-wit, No. 8 in car R-205, Pullman ticket No. 7359 on train No. 6, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to Chicago, Illinois, for which said drawing room accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $85.76, which said sum of $85.76, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10) and against the peace and dignity of the United States of America.

Eighth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

1. That at all times in this indictment mentioned, the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Central of Georgia Railway Company, the Louisville and Nashville Railway Company and the Pennsylvania Railroad Company were common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, Florida, a point on the railway lines of said Florida East Coast Railway Company, over a jointly established through route, and Chicago, in the State of Illinois, a point on the railway line of said Pennsylvania Railroad Company, said common carriers being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "'An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned the Pullman Company was a corporation, a sleeping-car company common carrier, engaged in the operation of sleeping cars upon and over the lines of said railway companies and was also subject to the provisions of said Act as amended.

3. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies and said Pullman Company in the sale of passenger tickets and Pullman Company tickets for space on said sleeping cars.

4. That at all times herein mentioned the lawful and regularly established rate of said Pullman Company for

a drawing room from Miami, Florida, to Chicago, Illinois, including tax, was $45.76, said lawful rate for said drawing room accommodations of the said Pullman Company having been established by schedules or tariffs duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said commission and in force and effect at all times herein mentioned.

5. That heretofore, to-wit, on the 24th day of February, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity as such employee of said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and diferent compensation for transportation of passengers and for service in connection therewith between Miami, Florida, and Chicago, Illinois, named in the tariffs aforesaid, than the rates, fares and charges specified in said tariffs filed and in effect at the time, in that he, the said Terence P. O'Rourke, did furnish and sell to one William Gerhard Balz a ticket for drawing room accommodations, to-wit, No. B in car R-205, Pullman ticket No. 7359 on train No. 6, then and there being operated by said Pullman Company over the lines of said railroad companies and over said through route from Miami, Florida, to Chicago, Illinois; for which said drawing room accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $85.76, which said sum of $85.76, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations in tariffs filed and in effect at the time as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 6, Sub-section 7) and against the peace and dignity of the United States of America.

Ninth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

1. That at all times in this indictment mentioned, the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railway Company and the Pennsylvania Railroad Company were corporations and common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, in the State of Florida, a point on the railway lines of said Florida East Coast Railway Company, over a joint established through route from New York, in the State of New York, a point on the railway line of said Pennsylvania Railroad Company, said common carrier being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies in the sale of passenger tickets over the lines of said railroad companies.

3. That at all times herein mentioned the lawful and regularly established joint through rate of fare of said railroad companies for the transportation of passengers in reserved coach seats from Miami, Florida, to New

York, New York, including tax was $32.64, said lawful rate of fare having been established by tariffs or schedules duly printed, published and filed by the said common carriers with the Interstate Commerce Commision, as required by law, and were on file with said commission and in force and effect at all times herein mentioned.

4. That heretofore, to-wit, on the 4th day of March A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive from one David Bieler of 1250 Ocean Avenue, Brooklyn, New York, a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of the said Act of Congress than the said carriers collected and received from other persons for doing for them a like and contemporaneous serivce in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to the said David Bieler two tickets for two coach seats from Miami, Florida, to New York, New York, to-wit, for seats Nos. 54 and 55 in car Ch. 9 on a railroad train known as the Champion over the lines of said railroad companies and over said through route from Miami, Florida, to New York, New York, for which said railroad tickets the said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $75.28, which said sum of $75.28, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said transportation as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10) and against the peace and dignity of the United States of America.

Tenth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

1. That at all times in this indictment mentioned, the Florida East Coast Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railway Company and the Pennsylvania Railroad Company were corporations and common carriers engaged in the transportation of property and persons for hire, wholly by railroad, between Miami, in the State of Florida, a point on the railway lines of said Florida East Coast Railway Company, over a joint through route from New York, in the State of New York, a point on the railway line of said Pennsylvania Railroad Company, said common carrier being hereinafter referred to as railroad companies, which were subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That at all times herein mentioned Terence P. O'Rourke was a person acting for and employed by said Florida East Coast Railway Company, to-wit, a passenger ticket seller and was acting for said railroad companies in the sale of passenger tickets over the lines of said railroad companies.

3. That at all times herein mentioned the lawful and regularly established joint through rate of fare of said railroad companies for the transportation of passengers in reserved coach seats from Miami, Florida, to New York, New York, including tax, was $32.64, said lawful rate of fare having been established by tariffs or schedules duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as

required by law, and were on file with said Commission and in force and effect at all times herein mentioned.

4. That heretofore, to-wit, on the 4th day of March, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and different compensation for transportation of passengers and for service rendered and to be rendered in the tarnsportation of passengers between Miami, Florida, and New York, New York, being points named in said tariffs, filed, published and in effect as aforesaid than the rates, fares and charges specified in said tariffs, in that he, the said Terence P. O'Rourke, did furnish and sell to one David Bieler two railroad tickets for the transportation of two passengers over said joint through route from Miami, Florida, to New York, New York, in reserve coach seats, to-wit, seat Nos. 54 and 55 in car Ch. 9 on a railroad train known as the "Champion", for which said railroad tickets the said Terence P. O'Rourke collected and received as compensation therefor the sum of $75.28, the said sum of $75.28 as said defendant then and there well knew was a different and greater compensation than that provided and legally established for said railroad tickets as aforesaid.

Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 6) and against the peace and dignity of the United States of America.

(Sgd.) ERNEST L. DUHAIME,
Asst. United States Attorney.

A True Bill.

(Sgd.) ROYCE CHALMERS,
Foreman.

Filed in open Court this 12th day of April, A. D. 1944. Edwin R. Williams, Clerk. By Earle F. Sprigg, Deputy Clerk.

On April 14, 1944, there was filed a demurrer of the defendant to the indictment in the words and figures as follows:

53 DEMURRER TO INDICTMENT.

In the District Court of the United States of America, in and for the Southern District of Florida, Miami Division.

United States of America,
vs. 6400-M-Cr.
Terence P. O'Rourke.

Now Comes the above named defendant, by his attorneys, Riley & Dressler, and demurs to the indictment herein, and each and every count thereof, jointly and severally, and for grounds of demurrer says:

1. That under the statutes of the United States, (Title 49, U. S. Code, Sections 2 and 10, and other related statutes, contained in the Act of February 4, 1887, Ch. 104, Part 1, Sec. 2, 24 Stat. 379; Act of February 28, 1920, Ch. 91, Sec. 404, 41 Stat. 479; Act of June 19, 1934, Ch. 652, Sec. 602 (b), 48 Stat. 1102; Act of August 9, 1935, Ch. 498, Sec. 1, 49 Stat. 543), the criminal acts therein set forth apply solely to common carriers or shippers, or their agents, acting for such common carriers within the scope of the agents' employment; and that the indictment herein fails to allege that the common carrier or common carriers had committed an offense under the statutes in ques-

tion, and that the defendant or defendants were aiders, abettors, accomplices, and acessories of the common carrier or carriers described in the indictment.

2. That under Chapter 2, Sec. 41, (2) covering liability of corporation carriers and agents, and offenses and penalties, it is provided: "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, Acting Within the Scope of His Employment, shall in every case be also deemed to be the act, omission or failure of such carrier or shipper as well as that of the person", and the indictment fails to allege (a) an offense committed by a common carrier, and (b) that the acts alleged to have been done by the defendant mentioned in the indictment, were in the course of his employment by the carrier, and that when committing such acts, the defendant was acting within the scope of his employment.

3. Under the statutes, as well as the proper, legal interpretation thereof, unless the indictment alleges a common carrier guilty as principal, the carrier's agents or employees cannot be charged with or be found guilty of a violation of the act, in that the offenses described in the statute covering the offenses attempted to be alleged in the indictment, can only be committed by a class, viz. common carriers, or employees or agents, acting within the scope of their employment.

4. The indictment shows that the accused acted without his employment, in trespass against his employer, and for the sole benefit of the accused; and that his acts attach no criminality to the carrier, and without the carrier being charged with and found guilty as principal, the accused cannot be charged with or found guilty, as agent, employee, aider, abettor or accomplice.

5. The statutes upon which the indictment is based, and related statutes covering transportation in interstate commerce, do not bring within the statutes, the acts set forth in the indictment, and "Laws which create crime ought to be so explicit that all men subject to their penalties may know what * * * to avoid, and before a man can be punished his case must be plainly and unmistakably within the statute."

6. That the indictment is based upon Sections 2 and 10 of Chapter 1 of Title 49, U. S. Code, and that Section 41 of Chapter 2 of said Title 49 states:

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation,"

and that subdivision 2 of said section 41 states:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, Acting Within the Scope of His Eemployment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

and that the indictment fails to allege that the accused was acting within the scope of his employment; and the said indictment fails to proceed against the common carrier, as principal, referred to in said indictment.

Wherefore, this defendant says that said indictment and each and every count thereof charges no offense under

the statutes of the United States, and that this defendant should go hence without day.

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

State of Florida,
County of Dade, ss.

Bart. A. Riley, being duly sworn, deposes and says that he is of counsel in the above entitled cause; that the foregoing demurrer is not interposed for the purpose of delay; that the foregoing demurrer is well founded in point of law.

(Sgd.) BART. A. RILEY.

Sworn to and subscribed before me this 14th day of April, A. D. 1944.

(Sgd.) SALLY HORNREICH,
(Notarial Seal) Notary Public, State of Florida at large.

My Commission Expires Mar. 13, 1947.

On April 14, 1944, there was filed defendant's motion for Bill of Particulars in the words and figures as follows:

56 MOTION FOR BILL OF PARTICULARS.

In the District Court of the United States of America, in and for the Southern District of Florida, Miami Division.

United States of America,
vs. 6400-M-Cr.
Terence P. O'Rourke.

Comes Now the defendant above named, by his attorneys, Riley & Dressler, and moves the Court for an order requiring the United States to furnish said defendant within a time to be therein specified, a minute bill of par-

ticulars as to the following matters alleged in the indictment herein as follows:

What portion of the money, alleged to have been collected and received by said Terence P. O'Rourke as described in each count of the indictment, was, by the said Terence P. O'Rourke, turned in to the Forida East Coast Railroad Company, and what portion of said sum of money so described in each count was retained by the said Terence P. O'Rourke.

In the sale of the transportation and sleeping car accommodations, by said Terence P. O'Rourke, as in each count of the indictment contained, was or was not the said defendant acting within the scope of his employment, as an agent and employee of the common carrier or carriers described in the indictment.

Did the Florida East Coast Railroad Company and the other common carriers described in the indictment, and referred to in each and every count thereof, receive a greater compensation for the service rendered and to be rendered in the transportation of passengers subject to the provisions of said Act of Congress, described in said indictment, than said carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Did the common carriers, described in the indictment, commit, as principal, the acts set forth in the indictment as being unlawfully done by the defendant, and was the defendant an aider, abettor, or accomplice of the said common carriers described in the indictment.

Dated at Miami, Florida, this 14th day of April, 1944.

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

On May 17, 1944 there was filed an opinion denying motion for bill of particulars and overruling demurrer of the defendant in the words and figures as follows:

In the District Court of the United States for the Southern District of Florida, Miami Division.

58 United States of America,
v. No. 6400-M-Criminal.
Terence P. O'Rourke.

For the reasons stated in the opinion this day filed in case No. 6399-M-Criminal, United States v. Stanley Howitt, et al., the demurrer in this case should be overruled.

The motion for bill of particulars is denied.

Order may be presented.

At Miami, Florida, this 17th day of May, 1944.
(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On May 20, 1945 there was filed an order of the Court overruling demurrer and denying motion for bill of particulars in the words and figures as follows:

59 ORDER.

In the United States District Court in and for the Southern District of Florida, Miami Division.

United States of America,
vs. No. 6400-M-Criminal.
Terence P. O'Rourke.

This cause coming on to be heard before me on a Demurrer addressed to the indictment in said cause and on

a Motion for a Bill of Particulars and the oral argument of counsel having been heard and the briefs submitted in support thereof, and the Court having entered its formal opinion with the Clerk of the Court, it is thereupon

Ordered and Adjudged that the Demurrer be and the same is hereby overruled. It is further

Ordered and Adjudged that the Motion for Bill of Particulars be and the same is hereby denied.

Done and Ordered at Miami, Florida, this the 20th day of May, A. D. 1944.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

Excerpts of Court minutes as recorded in the Miami Minute Book No. 28, page 817, January 29, 1945, in the words and figures following:

60 United States of America,
vs. #6399-M-Cr.
Stanley Howitt, Flora Post Lee, James F. Dewhurst

Vio: Conspiracy in re sale of railroad tickets Sec. 88 T. 18 U. S. C. A.

and

United States of America,
vs. #6400-M-Cr.
Terence P. O'Rourke.

Vio: Interstate Commerce re sale of railroad tickets, Sec. 2, 6, 10. T. 49 U. S. C. A.

Comes now into open Court the Assistant United States Attorney Ernest L. Duhaime, Esq. who prosecutes for the

United States of America, and Irving Goldstein, Esq., Special Assistant to the Attorney General and the defendants, Stanley Howitt, Flora Post Lee, James F. Dewhurst and Terence P. O'Rourke, each in their own proper person attended by counsel Bart A. Riley, Esq.

Upon agreement of counsel the Court is moved to consolidate cases Nos. 6399-M-Cr. and 6400-M-Cr. and said motion is granted by the Court in pursuance of authority vested in the Court by United States Revised Statutes, Section 921, United States Code, Tite 28, Section 734, it is considered by the Court that the above styled causes be consolidated for trial and that separate verdicts be drawn and separate judgments entered in said causes.

There are now duly sworn according to law the following named Jurors to try the issues herein:

Robert J. Dykes, George P. Crews, Harry Embree, Jr., Edward Rawls, Norman M. McDonald, William A. Morton, Frank L. Pond, William Fraser, Axel Jensen, J. Fletcher Sturdivant, William J. Shannon, William F. Franz.

The trial of this case is now recessed until tomorrow at 9:30 A. M. and the Jurors are cautioned as to their conduct during that time.

Excerpts of Court Minutes as recorded in the Miami Minute Book No. 28, page 819, January 30, 1945, in the words and figures following:

60a United States of America,
vs. #6399-M-Cr.
Stanley Howitt, Flora Post Lee, James F. Dewhurst

Vio: Conspiracy in re sale of railroad tickets Sec. 88 T. 18, U. S. C. A.

and

United States of America,
vs. #6400-M-Cr.
Terence P. O'Rourke.

Vio: Interstate Commerce re sale of railroad tickets, Sec. 2, 6, 10, T. 49 U. S. C. A.

Comes again into open Court the Assistant United States Attorney Ernest L. Duhaime, Esq. who prosecutes for the United States of America, and Irving Goldstein, Esq., Special Assistant to the Attorney General and the defendants, Stanley Howitt, Flora Post Lee, James F. Dewhurst and Terence P. O'Rourke, each in their own proper person attended by counsel Bart A. Riley, Esq. and A. C. Dressler, Esq.

Due to the fact that the Court reporter was not present at the opening day of the trial, counsel for the defendants, for the purpose of the record, again moves the Court to consolidate the above causes for trial, which motion is granted by the Court in pursuance of authority vested in the Court by United States Revised Statutes, Section 921, United States Code, Title 28, Section 734, it is considered by the Court that the above styled causes be consolidated for trial and that separate verdicts be drawn and separate judgments entered in said causes.

Defendant moves to have plea in Bar in case No. 6399-M-Cr. apply to defendant in case No. 6400-M-Cr. and with the same ruling sustaining demurrers to said pleas. Said motion is granted by the Court.

The said defendants having not been heretofore arraigned are now duly arraigned upon the indictment filed herein, reading of said indictment being waived and defendants, Stanley Howitt, Flora Post Lee, James F. Dewhurst and Terence P. O'Rourke each enter a plea of Not Guilty.

Whereupon, it is Ordered by the Court that the trial of this case proceed.

Government's motion to dismiss Counts Nos. 5 and 6 in Case No. 6400-M-Cr. is granted by the Court.

To maintain the issues herein on behalf of the Government there are duly sworn and testified as witnesses: R. T. Jeffries, (Government Exhibits Nos. 1, 2, 3 are filed in evidence), David Curry, Elliott Elkin, Donald C. Frankel, Albert Deverick, Morris Jack Goldberg, J. Dudley Lockrem, Lewis Walter Banach, David Osmousky, Helene C. Hanna, John F. Loome, William Wooten, David Bieler Paul Miller, Henry Sobel.

It is Ordered that the trial of this case be now recessed until tomorrow morning at 9:30 o'clock and the jurors are cautioned as to their conduct during that time.

Excerpts of Court Minutes as recorded in the Miami Minute Book No. 28, page 322, January 31, 1945, in the words and figures following:

61 United States of America,

vs. #6399-M-Cr

Stanley Howitt, Flora Post Lee, James F. Dewhurst,

Vio: Conspiracy in re sale of railroad tickets, Sec. 88, T. 18, U. S. C. A.

and

United States of America,

vs. #6400-M-Cr.

Terence P. O'Rourke.

Vio: Interstate Commerce re sale of railroad tickets, Sec. 2, 6, 10, T. 49 U. S. C. A.

Comes again into open Court the Assistant United States Attorney Ernest L. Duhaime, Esq. who prosecutes for the United States of America, and Irving Goldstein, Esq., Special Assistant to the Attorney General and the defendants, Stanley Howitt, Flora Post Lee, James F. Dewhurst and Terence P. O'Rourke, each in their own proper person attended by counsel Bart A. Riley, Esq. and A. C. Dressler, Esq..

To maintain the issues herein on behalf of the Government there are duly sworn and testified as witnesses: John F. Loome, recalled; John P. Smart; Zack Johnson; Edwin B. Poorman; John F. Loome, recalled; Eula S. Ohler; William G. Balz; Ralph W. Mills; Mike Tose; Joel Weiss; John P. Smart, recalled; (Government Exhibit No. 7 is filed in evidence); Laird K. Smith; (Government Exhibit No. 8 is filed in evidence); W. M. Wharton; J. K. Breaux; Eldon N. Penn; (Government Exhibit No. 4 is filed in evidence); W. A. Rhodes.

Government rests.

Defendants' motion for a directed verdict is denied by the Court.

No testimony is offered by the defendants.

Defendants rest.

Government and Defendants close.

And now the Jury having heard the argument of the Assistant United States Attorney and the charge of the Court, retire to consider their verdict, and having considered their verdict return into open Court and render their verdict in the words and figures following:

62 VERDICT.

In the United States District Court, in and for the Southern District of Florida.

United States of America,
vs. No. 6399-M-Cr
Stanley Howitt, Flora Post Lee, and James F. Dewhurst.

Miami, Florida,
January 31, 1945.

We the Jury, find the defendant Stanley Howitt, Guilty, and the defendant Flora Post Lee, Guilty, and the defendant James F. Dewhurst, Guilty.

So say we all.

(Sgd.) ROBERT J. DYKES,
Foreman.

VERDICT.

In the United States District Court in and for the Southern District of Florida.

United States of America,
vs. No. 6400-M-Cr
Terence P. O'Rourke.

Miami, Florida,
January 31, 1945.

We, the Jury, find the defendant Terence P. O'Rourke, Guilty on counts 1, 2, 3, 4, 7, 8, 9, & 10.

So say we all.

(Sgd.) ROBERT J. DYKES,
Foreman.

It is Ordered that the defendants Stanley Howitt, James F. Dewhurst and Terence P. O'Rourke be allowed to be at liberty on their bonds on file and Flora Post Lee is allowed to be at liberty on her own recognizance. Defendants to be at liberty until February 3, 1945, and at that time sentence will be imposed.

It is further ordered by the Court that all Petit Jurors who served in the foregoing case be excused upon the term, and the Clerk is instructed to issue pay vouchers for their necessary mileage and per diem.

On February 3, 1945 there were filed Judgments and Commitments in the words and figures as follows:

63 JUDGMENT AND COMMITMENT.

District Court of the United States, Southern District of Florida.

United States
v.
Stanley Howitt.

No. 6399-M-Cr. Criminal Indictment in one count for violation of U. S. C., Title 18, Sec. 88.

On this 3rd day of February, 1945, came the United States Attorney, and the defendant Stanley Howitt, appear in proper person, and attended by counsel Bart A. Riley, Esq. and A. C. Dressler, Esq., and,

The defendant having been convicted on verdict of guilty of the offense charged in the indictment in the above-entitled cause, to-wit: unlawfully conspired to violate the Interstate Commerce Act (Title 18, Section 88, U. S. C. A.) and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One Year and One Day.

It is further Ordered and Adjudged that the United States of America do have and recover of and from the defendant Stanley Howitt, the sum of One Thousand Dollars ($1000.00) as a fine imposed herein, without costs, and that said defendant be further imprisoned until payment of said fine.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JOHN W. HOLLAND,
United States District Judge.

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64 JUDGMENT AND COMMITMENT.

District Court of the United States, Southern District of Florida.

United States
v.
Flora Post Lee.

No. 6399-M-Cr. Criminal Indictment in one count for violation of U. S. C., Title 18, Sec. 88.

On this 3rd day of February, 1945, came the United States Attorney, and the defendant Flora Post Lee appearing in proper person, and attended by counsel, Bart A. Riley, Esq. and A. C. Dressler, Esq. and,

The defendant having been convicted on verdict of guilty of the offense charged in the indictment in the above-entitled cause, to-wit: unlawfully conpsired to violate the Interstate Commerce Act (Title 18, Section 88, U. S. C. A.) and the defendant having been now asked whether she has anything to say why judgment should

not be pronounced against her, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One Year and One Day.

It is further Ordered and Adjudged that the United States of America do have and recover of and from the defendant Flora Post Lee, the sum One Thousand Dollars ($1000.00) as a fine imposed herein, without costs, and that said defendant be further imprisoned until payment of said fine.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JOHN W. HOLLAND,
United States District Judge.

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65 JUDGMENT AND COMMITMENT.

District Court of the United States, Southern District of Florida.

United States
v.
James F. Dewhurst.

No. 6399-M-Cr. Criminal Indictment in one count for violation of U. S. C., Title 18, Sec. 88.

On this 3rd day of February, 1945, came the United States Attorney, and the defendant James F. Dewhurst

appearing in proper person, and attended by counsel Bart A. Riley, Esq. and A. C. Dressler, Esq., and,

The defendant having been convicted on verdict of guilty of the offense charged in the indictment in the above-entitled cause, to-wit: unlawfully conspired to violate the Interstate Commerce Act (Title 18, Section 88, U. S. C. A.) and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for the period of One Year and One Day.

It is further Ordered and Adjudged that the United States of America, do have and recover of and from the defendant James F. Dewhurst, the sum of One Thousand Dollars ($1000.00) as a fine imposed herein, without costs, and that said defendant be further imprisoned until payment of said fine.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JOHN W. HOLLAND,
United States District Judge.

66 JUDGMENT AND COMMITMENT.

District Court of the United States, Southern District of Florida.

United States
v.
Terence P. O'Rourke.

No. 6400 Criminal Indictment in ten counts for violation of U. S. C., Title 49, Secs. 2, 6, 10.

On this 3rd day of February, 1945, came the United States Attorney, and the defendant Terence P. O'Rourke appearing in proper person, and attended by counsel Bart A. Riley, Esq. and A. C. Dressler, Esq., and,

The defendant having been convicted on verdict of guilty on Cts. 1, 2, 3, 4, 7, 8, 9, and 10 of the offenses charged in the indictment in the above-entitled cause, to-wit: unlawfully violated certain provisions of the Interstate Commerce Act (Title 49, Sections 2. 6, and 10) and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eighteen Months on counts #1, #2, #3, #4, #7, #8, #9, #10 of the indictment, sentence on each count to run concurrently with each other.

It is further Ordered and Adjudged that the United States of America, do have and recover of and from the

defendant Terence P. O'Rourke, the sum of One Thousand Dollars ($1000.00) as a fine imposed herein, without costs, and that said defendant be further imprisoned until payment of said fine.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JOHN W. HOLLAND,
United States District Judge.

On February 3, 1945, there was filed a motion for a new trial in the words and figures as follows:

67 MOTION FOR NEW TRIAL.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America,
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Now comes the defendants and move the Court to grant a new trial herein on the following grounds:

(1) The verdict is contrary to the law in that from the evidence adduced in this case no violation of the Interstate Commerce Act, and its amendments, was proven.

(2) The Court erred in denying the motion of the defendants for a directed verdict.

(3) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates

specified in the tariffs filed with the Interstate Commerce Commission."

(4) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

(5) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

(6) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

(7) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made."

(8) The Court erred in giving the following instruction to the jury on behalf of the Government, said instruction being as follows:

"Passenger accommodations should be equally available to the general public."

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER.

On February 3, 1945 there was filed an order denying motion for new trial in the words and figures as follows:

69 ORDER.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

This Cause coming on to be heard before me, upon Motion for New Trial, and the Court being fully advised in the premises;

It is Ordered that said Motion be and the same is hereby denied.

Dated at Miami, Florida, February 3, 1945.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On February 3, 1945, there was filed an order fixing supersedeas bonds in the words and figures as follows:

70 ORDER FIXING AMOUNT OF SUPERSEDEAS BOND.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

On motion of the attorneys for the above named defendants, and it appearing that said defendants have respectively sued out Notice of Appeal herein;

It is Hereby Ordered that a Supersedeas Bond for each of said defendants is fixed as herein set forth, and that

upon the filing and approval by the Clerk of this Court of a bond conditioned in accordance with law said defendants so filing such bonds be restored to liberty pending said appeal.

Name	Amount of Bond
Stanley Howitt	$500.00
Flora Post Lee	$500.00
James Dewhurst	$500.00
Terence P. O'Rourke	$500.00

Done and Ordered this 3rd day of February, A. D. 1945.

(Sgd.) JOHN W. HOLLAND,
United States District Judge.

On February 3, 1945 there was filed Notices of appeal and grounds thereof of each defendant in the words and figures as follows:

71 NOTICE OF APPEAL OF FLORA POST LEE

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Name and Address of Appellant: Flora Post Lee, 2266 S. W. 2nd St., Miami, Florida.

Name and Address of Appellant's Attorneys: Bart A. Riley, and A. C. Dressler, 1030 Seybold Building, Miami, Florida.

Offense: Conspiracy to violate Interstate Commerce Act, Title 49 U. S. C. A.

Date of Judgment: February 3, 1945.

Brief Description of judgment or sentence: 1 yr. & 1 day & $1000 fine.

Name of prison where now confined, if not on bail: Defendant on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment above mentioned, on the grounds set forth below.

(Sgd.) FLORA POST LEE,
Appellant.

Dated at Miami, Dade County, Florida, this 3rd day of February, 1945.

Grounds of Appeal.

Now comes the defendant and for grounds of appeal herein says:

1. The Court erred in overruling the demurrer to the indictment herein.

2. The Court erred in sustaining the demurrer of the Government to the defendant's Plea in Bar.

3. The Court erred in denying motion for directed verdict.

4. The Court erred in receiving verdict.

5. The Court erred in entering judgment.

6. The Court erred in charging the jury as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection

and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

7. The Court erred in charging the jury as follows:

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

8. The Court erred in charging the jury as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall wifully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

9. The Court erred in charging the jury as follows:

"Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

10. The Court erred in charging the jury as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman ac-

commodations are the only lawful charge which may be made."

11. The Court erred in charging the jury as follows:

"Passenger accommodations should be equally available to the general public."

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

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74 NOTICE OF APPEAL OF JAMES DEWHURST.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Name and Address of Appellant: James Dewhurst, 4150 S. W. 8th Street, Miami, Florida.

Name and Address of Appellant's Attorneys: Bart A. Riley, and A. C. Dressler, 1030 Seybold Building, Miami, Florida.

Offense: Conspiracy to violate Interstate Commerce Act, Title 49 U. S. C. A.

Date of Judgment: February 3, 1945.

Brief Description of judgment or sentence: 1 yr. & 1 day & $1000 fine.

Name of prison where now confined, if not on bail: Defendant on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment above mentioned, on the grounds set forth below.

(Sgd.) JAMES DEWHURST,
Appellant.

Dated at Miami, Dade County, Florida, this 3rd day of February, 1945.

Grounds of Appeal.

Now comes the defendant and for grounds of appeal herein says:

1. The Court erred in overruling the demurrer to the indictment herein.

2. The Court erred in sustaining the demurrer of the Government to the defendant's Plea in Bar.

3. The Court erred in denying motion for directed verdict.

4. The Court erred in receiving verdict.

5. The Court erred in entering judgment.

6. The Court erred in charging the jury as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for service rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

7. The Court erred in charging the jury as follows:

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained

of here or that the acts were intentionally committed by the carrier."

8. The Court erred in charging the jury as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

9. The Court erred in charging the jury as follows:

"Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

10. The Court erred in charging the jury as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made."

11. The Court erred in charging the jury as follows:

"Passenger accommodations should be equally available to the general public."

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

77 NOTICE OF APPEAL OF STANLEY HOWITT.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Name and Address of Appellant: Stanley Howitt, 2355 S. W. 12th Street, Miami, Florida.

Name and Address of Appellant's Attorneys: Bart A. Riley, and A. C. Dressler, 1030 Seybold Building, Miami, Florida.

Offense: Conspiracy to violate Interstate Commerce Act, Title 49 U. S. C. A.

Date of Judgment: February 3, 1945.

Brief Description of judgment or sentence: 1 yr. & 1 day & $1000 fine.

Name of prison where now confined, if not on bail: Defendant on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Cir-

cuit from the judgment above mentioned, on the grounds set forth below.

(Sgd.) STANLEY HOWITT,

Appellant.

Dated at Miami, Dade County, Florida, this 3rd day of February, June, 1945.

Grounds of Appeal.

Now comes the defendant and for grounds of appeal herein says:

1. The Court erred in overruling the demurrer to the indictment herein.

2. The Court erred in sustaining the demurrer of the Government to the defendant's Plea in Bar.

3. The Court erred in denying motion for directed verdict.

4. The Court erred in receiving verdict.

5. The Court erred in entering judgment.

6. The Court erred in charging the jury as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third. by the making and giving of undue preferences and advantages to certain persons; and fourth. by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which

the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

7. The Court erred in charging the jury as follows:

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

8. The Court erred in charging the jury as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

9. The Court erred in charging the jury as follows:

"Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

10. The Court erred in charging the jury as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made."

11. The Court erred in charging the jury as follows:

"Passenger accommodations should be equally available to the general public."

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

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80 NOTICE OF APPEAL OF TERENCE P. O'ROURKE.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Name and Address of Appellant: Terence O'Rourke, 38 W. Park St., Long Beach, N. Y.

Name and Address of Appellant's Attorneys: Bart A. Riley and A. C. Dressler, 1030 Seybold Building, Miami, Florida.

Offense: To violate Interstate Commerce Act, Title 49 U. S. C. A.

Date of Judgment: February 3, 1945

Brief Description of judgment or sentence: 18 mos. & $1000 fine, each count to run concurrently.

Name of prison where now confined, if not on bail: Defendant on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment above mentioned, on the grounds set forth below.

TERENCE P. O'ROURKE.
(Terence P. O'Rourke)
Appellant.

Dated at Miami, Dade County, Florida, this 3rd day of February, 1945.

Grounds of Appeal.

Now comes the defendant and for grounds of appeal herein says:

1. The Court erred in overruling the demurrer to the indictment herein.

2. The Court erred in sustaining the demurrer of the Government to the defendant's Plea in Bar.

3. The Court erred in denying motion for directed verdict.

4. The Court erred in receiving verdict.

5. The Court erred in entering judgment.

6. The Court erred in charging the jury as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

7. The Court erred in charging the jury as follows:

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

8. The Court erred in charging the jury as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall wilfuly do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

9. The Court erred in charging the jury as follows:

"Passeng r transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

10. The Court erred in charging the jury as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made."

11. The Court erred in charging the jury as follows:

"Passenger accommodations should be equally available to the general public."

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendant.

On February 3, 1945 there was filed a receipt of United States Attorney in the words and figures as follows:

83 RECEIPT.

In the District Court of the United States of America in and for the Southern District of Florida, April Term, A. D. 1944, Held at Miami, Florida.

United States of America
vs.
Stanley Howitt, Flora Post Lee and James Dewhurst.

Consolidated Cases No. 6399-M Criminal, No. 6400-M Criminal.

United States of America
vs.
Terence P. O'Rourke.

Receipt of a copy of each of the following papers is acknowledged this 3rd day of February, 1945.

1. Motion for New Trial.
2. Order denying Motion for New Trial.
3. Notice of Appeal of Stanley Howitt.
4. Notice of Appeal of Flora Post Lee.
5. Notice of Appeal of James Dewhurst.

6. Notice of Appeal of Terence P. O'Rourke.
7. Order Fixing Amount of Supersedeas Bond.
8. Bond of Stanley Howitt.
9. Bond of Flora Post Lee.
10. Bond of James Dewhurst.
11. Bond of Terence P. O'Rourke.
12. Order Concerning Appeal.
13. Copy of the foregoing Receipt.

HERBERT S. PHILLIPS,
United States Attorney,
(Sgd.) By ERNEST L. DUHAIME,
Assistant United States
Attorney.

On February 23, 1945, there was filed a Praecipe for Preparation of Record on Appeal in the words and figures as follows:

84 PRAECIPE FOR PREPARATION OF RECORD ON APPEAL.

In the United States District Court in and for the Southern District of Florida, Miami Division.

Nos. 6399-M, 6400-M.

United States of America, Plaintiff,
v. No. 6399-M.
Stanley Howitt, Flora Post Lee and James F. Dewhurst, Defendants.

and

United States of America, Plaintiff,
v. No. 6400-M.
Terence P. O'Rourke, Defendant.

To: The Clerk of the above styled Court:

You are directed to prepare and certify according to law a transcript of record on appeal; said transcript to contain a true copy of all of the proceedings of the records and files, (omitting all immaterial parts), of your office in the above entitled consolidated cases, which are as follows, unless otherwise designated;

As to case No. 6399:

1. Recite the filing on April 12, 1944 and copy in full the indictment.

2. Recite the filing on April 14, 1944 and copy in full defendants' demurrer to the indictment.

3. Recite the filing on May 17, 1944 and copy in full opinion and order of the Court overruling defendants' demurrer.

4. Recite the filing on May 20, 1944 and copy in full order overruling demurrer of the defendants.

5. Recite the filing on January 16, 1945 and copy in full plea in bar.

6. Recite the filing on January 17, 1945 and copy in full instrument relating to said plea in bar filed by attorneys for the defendants.

7. Recite the filing on January 18, 1945 and copy in full demurrer of United States of America to the plea in bar.

8. Recite the filing on January 20, 1945 and copy in full order sustaining demurrer of the government to the plea in bar.

9. Copy in full minutes of the Court showing waiver of arraignment or arraignment, the entry of pleas of not guilty, impaneling of the jury, trial, verdicts, judgments and commitments.

As to case No. 6400-M:

10. Recite the filing on April 12, 1944 and copy in full the indictment.

11. Recite the filing on April 14, 1944 and copy in full demurrer of the defendant to indictment.

12. Recite the filing on April 14, 1944, and copy in full defendant's motion for bill of particulars.

13. Recite the filing on May 17, 1944 and copy in full order denying motion for bill of particulars and overruling demurrer of the defendant.

14. Recite the filing on May 20, 1944. and copy in full further order of the Court overruling demurrer and denying motion for bill of particulars.

15. Copy in full minutes of the Court showing waiver of arraignment, entry of plea of not guilty, impaneling of jury, trial, verdict, judgment and commitment.

As to Consolidated Cases 6399 and 6400:

16. Recite the filing on February 3, 1945 and copy in full motion for new trial of all defendants.

17. Recite the filing on February 3, 1945 and copy in full order denying motion for new trial.

18. Recite the filing on February 3, 1945 and copy in full order fixing supersedeas bonds.

19. Recite the filing on February 3, 1945 and copy in full notices of appeal and grounds thereof of each defendant in said consolidated cases.

20. Recite the filing on February 3, 1945 and copy in full receipt of United States Attorney for the following papers: motion for new trial, order denying motion for new trial, notices of appeal and grounds thereof of each defendant, order fixing amount of supersedeas bonds, order concerning appeal and copy of receipt.

21. Recite the filing and copy in full this Praecipe for preparation of record on appeal.

22. Recite the filing and copy in full order adopting this praecipe for preparation of record on appeal.

23. Recite the filing and copy in full Assignments of Error of the defendants in said consolidated cases.

24. Recite the filing and copy in full the Bill of Exceptions which shall include:

(a) The testimony in question and answer form;

(b) Copies of Government's Exhibit 1 to 8;

(c) All objections and rulings thereon by the Court, including motion for directed verdict by the defendants at the close of the government's case;

(d) All oral motions and rulings thereon by the Court;

(e) All charges given by the Court, including requested charges of the government, which were given by the Court; and

(f) All proper certificates according to law, and the settling, presenting and signing of the Bill of Exceptions.

Dated at Miami, Florida, this 23rd day of February, A. D. 1945.

(Sgd.) BART A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendants.

Receipt hereby acknowledged of a copy of the foregoing praecipe this 23 day of February, 1945.

HERBERT S. PHILLIPS,
United States Attorney,
(Sgd.) By ERNEST L. DUHAIME,
Asst. United States Attorney.

On February 23, 1945 there was filed an order adopting the praecipe for preparation of record on appeal in the words and figures as follows:

88 ORDER.

In the United States District Court in and for the Southern District of Florida, Miami Division.

Nos. 6399 & 6400-Consolidated Cases.

United States of America, Paintiff,
v. (6399)
Stanley Howitt, Flora Post Lee, and James F. Dewhurst, Defendants.

and

United States of America, Plaintiff,
v. (6400)
Terence P. O'Rourke, Defendant.

It appearing to the Court that appeals have been taken by the defendants in the above consolidated cases, and the

attorney for the appellants and appellee having appeared before the Court in response to the oral request of the Court, the following directions are given by the Court with respect to the preparation of the record on appeal:

1. The Bill of Exceptions shall include the testimony in question and answer form, and shall include photostatic copies of Government's Exhibits 1 to 8, inclusive; the Bill of Exceptions shall include all objections and rulings thereon by the Court; all oral motions and rulings thereon by the Court; all charges given by the Court, including requested charges of the government given by the Court; and all proper certificates according to law.

2. The Clerk shall follow the directions as prepared by the defendants, which directions are adopted by the Court as a part of this order as though the same were fully set out herein and said directions are therefore permitted to be filed pursuant hereto, and the government is allowed to file any cross-directions with the Clerk within 5 days, and the Clerk will thereupon prepare the record herein in accordance with this order, the directions of the appellants and the cross-directions, if any, of the appellee.

Dated at Miami, Florida, this 19th day of February, 1945.

(Sgd.) JOHN W. HOLLAND,
District Judge.

On February 28, 1945, there is filed Assignments of Error of the defendants in the words and figures as follows:

90 ASSIGNMENTS OF ERROR

In the United States District Court in and for the Southern District of Florida, Miami Division.

Nos. 6399-M, 6400-M.

United States of America, Plaintiff,
v.
Stanley Howitt, Flora Post Lee and James F. Dewhurst, Defendants.

and

United States of America, Plaintiff,
v.
Terence P. O'Rourke, Defendant.

Now come the defendants, Stanley Howitt, Flora Post Lee, James F. Dewhurst and Terence P. O'Rourke, and assign as error the following rulings and decisions of the Trial Judge as grounds of reversal before the United States Circuit Court of Appeals in and for the Fifth Circuit:

1. The Court erred in overruling the demurrer to the indictment herein.

2. The Court erred in sustaining the demurrer of the government to the defendants' plea in bar.

3. The Court erred in denying motion for directed verdict.

4. The Court erred in receiving verdict.

5. The Court erred in entering judgment.

6. The Court erred in charging the jury as follows:

"The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

7. The Court erred in charging the jury as follows:

"It is not necessary for the government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

8. The Court erred in charging the jury as follows:

"Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein. * * *"

9. The Court erred in charging the jury as follows:

"Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor."

10. The Court erred in charging the jury as follows:

"The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made."

11. The Court erred in charging the jury as follows:

"Passenger accommodations should be equally available to the general public."

Dated at Miami, Florida, this 28th day of February, 1945.

(Sgd.) BART. A. RILEY,
(Sgd.) A. C. DRESSLER,
Attorneys for Defendants.

ASSIGNMENT OF ERRORS omitted from the printed record, being heretofore copied at page 95.

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96 BILL OF EXCEPTIONS.

Filed Miami, Fla.

In the District Court of the United States in and for the Southern District of Florida, Miami Division.

(Consolidated cases) No. 6399-M-Cr., No. 6400-M-Cr.

United States of America, Plaintiff,
v.
Stanley Howitt, Flora Post Lee and James F. Dewhurst, Defendants.

and

United States of America, Plaintiff,
v.
Terence P. O'Rourke, Defendant.

Transcript of proceedings had and testimony taken in the above entitled consolidated cases before the Honorable

John W. Holland, District Judge, and a Jury, at Miami, Florida, on January 29, 30 and 31, 1945.

Appearances:
Ernest L. Duhaime, Esq., Assistant United States Attorney, for the Government.
Riley & Dressler, for the Defendants.

Miami, Florida,
January 29, 1945—4:00 P. M.

The Court:
I now call for trial the cases of United States v. Stanley Howitt, Flora Lee and James F. Dewhurst, and United States of America v. Terence P. O'Rourke—Nos. 6399 and 6400.

Mr. Duhaime:
The government is ready.

Mr. Riley:
The defense is ready, your Honor.

The Court:
Poll the panel.

(Panel polled.)

(Jury of twelve impaneled and sworn.)

The Court:
We will take an adjournment until tomorrow morning at 9:30 A. M.

(Trial adjourned to 9:30 A. M., January 30, 1945.)

Miami, Florida,
January 30, 1945. 9:30 A. M.

Mr. Riley:

If your Honor please, in talking with the Clerk this morning I find that there is not a complete recitation in the minutes of what was stated yesterday, so I wish to make this statement so as to get it into the minutes of the Court:

Upon motion of the defendants in cases Nos. 6399 and 6400, acquiesced in by the government, it is ordered that the two indictments be consolidated for trial; that upon motion of the defendants it is ordered that the pleas in bar filed by the defendants in case No. 6399 shall apply to the defendant in case No. 6400 the same as if therein set forth in writing, with the same rulings sustaining the demurrers to said pleas.

Mr. Duhaime:

That is agreeable.

Mr. Riley:

Upon learning this morning that the defendants have not been arraigned, I announce to the Court at this time that the defendants waive the reading of the indictments and each enters a plea of not guilty.

The Court:

That is as to all defendants in the two cases?

Mr. Riley:

Yes, sir.

The Court:

Is there any question to be made about the arraignment not having taken place prior to the swearing of the jury?

Mr. Riley:
No, sir.

The Court:
Very good.

Mr. Riley:
I would also request your Honor to enter the usual order that it will not be necessary for counsel to take exceptions to the rulings of the Court on objections to testimony or on motions made by counsel for either side during the progress of the case.

The Court:
That is correct; that will be the order in this case.

Mr. Riley:
The defendants now announce that they do not request the rule in regard to the exclusion of witnesses.

The Court:
Very good. You may make any opening statements you wish to make.

(Opening statement by Mr. Duhaime on behalf of the government.)

Mr. Riley:
The defense has no statement to make at this time.

Mr. Duhaime:
We would like to move at this time (I meant to do it sooner) to dismiss from case No. 6400 counts five and six.

The Court:
Is there any observation on that from the defense?

Mr. Riley:

No, your Honor.

The Court:

The motion is granted. Counts five and six are dismissed in case No. 6400. Call your first witness.

Thereupon: R. T. JEFFERIES, a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

102 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. R. T. Jefferies.

Q. Will you tell us your position with the railroad, the length of service and your general position at this time?

A. I am now assistant general passenger agent of the Florida East Coast Passenger Traffic Department. I have been with the Florida East Coast railroad since October, 1929. I started with them as Chief Clerk and progressed along—

Q. I see. The railroad rewarded you for your hard work.

A. Thank you.

Q. Mr. Jefferies, were you in the same capacity you now hold or in a similar capacity on or about December of 1943 and the spring of '44?

A. The capacity was the same, yes, but the title at that time was known as division passenger agent.

Q. Will you tell us what your duties consist of; not all of your duties but your general duties?

A. The general duties of the position, sir, are supervision and direction of the passenger traffic department

as it applies to Ft. Lauderdale, Fort Pierce, Key West and the Miami area. In the immediate vicinity it is supervision over the city ticket office reservation bureau, and such personnel as we have in such offices.

Q. Will you explain to the jury how the reservation department works with reference to the obtaining of tickets, Pullman accommodations and so forth?

A. We have in the Florida East Coast railroad a master switchboard which serves all departments of the railroad; that switchboard opens at six o'clock in the morning. We start accepting requests for reservations with the opening of the switchboard at six o'clock in the morning. We start at six o'clock because if we wait until eight o'clock there are so many other departments of the railroad open that we realize we would have extreme congestion on our switchboard. We only have some forty trunklines. At six o'clock in the morning, and for some considerable length of time thereafter, we start accepting reservations. Does that answer your question, sir?

Q. I would like to have you follow through with the opening of the switchboard at six o'clock in the morning; for instance, take an individual, Mr. Doe, and follow him through the procurement of a reservation, explaining about the diagram clerk, the ticket seller and everything up to the time Mr. Doe boards the train. As you know, we do not understand railroad workings.

A. All righ.t We will say that John Doe will call the Florida East Coast switchboard at six o'clock in the morning. John Doe's request will be accepted for a reservation, unless we already have too many requests for the particular date he has in mind. In other words, we limit the number of requests which we might accept, because there is no reason to accept reservation requests when obviously the requests cannot be filled. In other words, we may have too many requests ahead of you. We will assume that the request comes in for one month hence. The diagram clerk will note your name and telephone number,

or your address, on a slip of paper which is provided for such purpose and which is filed for reference. If they are successful in coming to your name in the assignment of space, one of the diagram clerks will call you and notify you that space has been assigned to you, requesting you to pick it up. Usually you are requested to pick it up within twenty four hours, unless it happens to fall on a week end. Now, if you have succeeded in making a reservation, you will proceed to the ticket office. You will say, "My name is John Doe; I have a reservation for Chicago", or New York or Washington or any of several destinations. You will ask for your ticket. Perhaps you are going coach or perhaps by Pullman. If you are going by coach, there is no charge for the seat reservation. If you are going by Pullman you of course pay for the sleeping car accommodation, and of course you are required to pay the ticket clerk for that. Then you proceed to the train on the date that you wish to leave. Do I bring it down enough?

Q. Explain more fully with respect to the diagram clerk and the ticket seller.

A. Let me bring it down further for you.

Q. Yes; go ahead.

A. The ticket office in Miami is open until five-thirty, and you may make a personal request there. If so, it will be transmitted to the diagram clerk. In other words, I do not mean to infer that it is necessary for you to telephone in to make a reservation, because you may personally present yourself at six o'clock. In fact, I have heard that in some places last year the people would line up at midnight so as to be there when the ticket office opens the next morning. When a reservation is finally accomplished and you have been accordingly notified, you will come to the station and say, "I am John Doe". Perhaps you will come to my ticket window; if so, I telephone to the diagram room and I say, "Do you have a reservation for John Doe". If you call there within twenty four

hours after the reservation is made, I will call the diagram clerk and get the Pullman ticket number, in the case of a Pullman reservation, or the coach ticket number in the case of a reserved seat coach train.

Q. Then in case Mr. Doe should go directly to the ticket seller's window, he would call the diagram clerk; is that true?

A. Yes.

Q. And that is done by telephone; that is, the ticket seller immediately calls the diagram clerk?

A. Correct.

Q. And the diagram clerk would put my name on a slip of paper and call me about the reservation, and then I would go down to the ticket seller to get the reservation, and the ticket seller would call the diagram clerk to confirm my reservation?

A. That is correct. Now, we will assume that you had a return portion of a coach ticket to New York City, we will say. We do not know that your ticket is properly routed or whether it is within the life of the ticket; therefore, they require you to present your ticket to the ticket clerk so that he may inspect it.

Q. In other words, the diagram clerk and the ticket seller work as a team?

A. That is right.

Q. One cannot work without the help of the other?

A. No, not under the operation such as we have here.

Q. Now, is there any preference as far as the railroad is concerned with respect to these reservations; in other words, is the first one who calls in or comes to the ticket office given the opportunity of the first seat available or the first accommodation available?

A. Yes. Request for reservations are timed in accordance with their receipt. In other words, if you telephone at six o'clock, that time will be indicated on the slip; the next one who calls may be 6:01, and the slip will denote that time—6:01.

Q. If at the time I called for my reservation at 6:00 o'clock none was available, my slip would still be there, and later on during the day a reservation became available, would the six o'clock reservation or request get preference over the request made at 6:01 or one at 6:02?

A. It should; yes, sir.

Q. In other words, first come first served?

A. That is the general proposition, yes.

Q. Now, Mr. Jefferies, these requests are put on a slip of paper with the names of the parties requesting them, together with the telephone number, address and time of the request?

A. Yes, sir.

Q. Are they placed on a card or put in a box, or just how is that done?

A. These slips are made out by those taking the requests and they are put together in accordance with time received.

Q. Filed numerically as to time?

A. Yes, sir.

Mr. Duhaime:

Mark these for identification.

(Said documents marked Plaintiff's Exhibits 1 and 2, respectively, for identification.)

Q. I hand you here something which has been marked government's exhibit 1 for identification, and I will ask you to explain to the jury what that is.

A. This is a diagram of a car. In other words, this is a diagram to us, and it is a chart as they call it in some places. This diagram or chart, as it may be called, shows the capacity and the accommodations available in a particular car. In other words, we refer to it as a blueprint. This particular diagram is referred to as ten, one and one —ten sections, one drawing room and one compartment.

Q. What do the names appearing on there indicate?

A. The names appearing on here would indicate that reservations had been made for the persons indicated.

Q. For the names indicated on that card?

A. That is right.

Q. Referring to this particular card, with whom were they made and by whom?

A. This particular card that you gave me, sir, is principally a military car.

Q. Will you explain what you mean by a military car?

A. A military car in this case is a car in which we have assigned practically the capacity of this car for the usage of the armed forces or to other agencies of the government. In other words, this is a GRB car, and this whole car, with the exception of one section, is a GRB car. That one section is assigned to Charleston, South Carolina, and that one section is held in the GRB at Charleston, South Carolina. This whole car is a military or GRB car—except that I see that there was a release in this car, this GRB car, and I notice that a name has been inserted.

Q. Who would make that release?

A. That release was made by the military service.

Q. In other words, they released the space?

A. Yes, sir.

Q. Can they refill the space or must that be done by the diagram clerk?

A. By the diagram clerk.

Q. In other words, all of the space on this car was held for government transportation?

A. Yes.

Q. If the government agency finds that Lieutenant Brown or Private Jones is not going on that train, they release that space and notify the Florida East Coast?

A. Notify the carrier.

Q. And then that space is made available to some other person; is that correct?

A. Yes.

Q. While we are on the subject of government transportation, will you tell the jury how the transportation system works in reference to space reserved for military and civilian transportation?

A. How it works as to the military personnel—

Q. As to the military personnel that would travel on these particular passenger trains where civilians also travel.

A. In a case such as that the Army, on the one hand, and the Navy, on the other, will establish Bureaus which they call Army Reservation Bureau and Navy Reservation Bureau, and in this city the Coast Guard and the Marine Corps funnel through the Navy Department. Now, space is allocated or allowed to those services. Any man in uniform must present himself not to the carrier but to one of these two Bureaus, and in this particular case to the Army or Navy, and if they find that he is properly proceeding under orders they will make the reservation for him.

Q. Will you tell us, if you can, the ratio of space available between civilian and military personnel on or about December of 1943 and the early months of 1944?

A. May I answer your question by saying that a substantial amount is held for the armed forces.

Q. A substantial allotment?

A. Yes.

Q. Would you say more than 50%?

A. Mr. Duhaime, I am a little bit afraid that a military secret may be involved in that question. I would rather just say that a substantial allotment is held. I might go further and say that a certain amount of space is likewise held by the carrier for military special cases; that, however, is included when I say "substantial allotment".

Q. While we are on this particular point of military travel, due to the situation which you have testified to with respect to the substantial amount of space available to military personnel, what result did that have on civilian travel as to accommodations?

A. It would of necessity restrict the civilian accommodations in a like proportion.

Q. Now did that at that time cause a limited amount of reservations and an abundance of requests by civilians?

A. Very definitely.

Q. Would you say that the situation so existed in the Miami area because of the tourist situation from other towns and cities?

A. I believe that the situation which obtained in Greater Miami area during the period in question was greatly aggravated by that. I believe some of your publicity men came out last spring and said that it was probably the greatest season in years, that they had never had so many people here before.

Q. Is this an official diagram card from the Florida East Coast Miami office?

A. It appears to be.

Q. Now I will hand you government's exhibit number 2 for identification, and I will ask you to explain if there is any difference between this one and the Exhibit 1, which I believe you said was a military car?

A. Perhaps we should refer to it as a car in the GRB pool. In other words, perhaps this is not a military car, but space was allocated to military personnel in that car. This is a diagram of a reserve seat coach, and this to us would be termed a sixty-seat coach. In principle it is the same as the Pullman diagram. It is merely a chart to indicate what space may be available in this particular car. This particular car is likewise one not necessarily provided for military purposes, but is one provided to help out a bunch of boys on furlough. This furlough car is not a Government Reservation Bureau car, but this

space in this particular car was excluded from civilians in an effort on the part of the carrier to provide for the furnishing of accommodations to a bunch of boys on furlough.

Q. In other words, do I understand that the card referred to as government's exhibit 2 for identification is a car reserved for military personnel on furloughs?

A. That is correct.

Q. How did they obtain reservations?

A. Sir, at this particular time these men would present themselves to the Clerks and the ticket clerks would call the diagram clerks and say, "I have a soldier, a sailor, a Wave, Wac or any other of the uniform services."

Q. And on his or her furlough papers he or she would get the space if it were available?

A. Correct.

Q. Could this space be used for civilians if not used by military furlough personnel?

A. Yes, it could have been used by civilians after proper release time.

Q. What is the proper release time?

A. I do not recall the actual release time for this car for civilian usage. There are some erasures on it which indicates that some space was available on it. Anyway, this car was held to a 50-seat car, and upon receipt of advice as to the actual capacity, it was extended to an actual 54-seat space in the car as to availability.

Q. Now. I will ask you this question: do the different cars have different release times?

A. Not the different cars, but the different trains have different release times.

Q. In other words, a train leaving in the evening, the release time would be approximately when?

A. Several hours before departure.

Q. One way or the other—

A. I would prefer to answer it as I have, Mr. Dûhaime.

Q. In other words, we are all ignorant about railroad matters.

A. That question involves perhaps a matter of military intelligence or a military secret.

Q. I understand that. I will ask you this question: in government's Exhibit 1 for identification—that was for Pullman space?

A. Yes, sir.

Q. Is there an extra charge for Pullman space over and above the price of the ticket?

A. Railroad ticket?

Q. Yes.

A. Yes; you pay for the accommodations used.

Q. You pay for the accommodations utilized?

A. Yes, sir.

Q. With reference to government's exhibit 2 which you have in your hand, is there an extra charge for the reservations in this coach space?

A. No, sir.

Q. They are reserved but you get them on your ticket alone?

A. Correct.

Mr. Duhaime:

Mark this for identification.

(Said document was marked Government's Exhibit Number 3 for identification.)

Q. I hand you government's exhibit 3 for identification, and will ask you if there is any difference in that diagram card and the first and second ones that you have already identified?

A. This is a diagram of a Pullman car, and it is the same as the first one; it is, however, a different capacity car. This car to us is described as ten sections, one com-

partment and two double bedrooms, and it is different as to the plan of the car.

Q. Is that a government car, as you testified with respect to Exhibit 1 for identification?

A. A certain amount of space is allocated in this car for government usage.

Q. Would you call it a government car, the same as the first one?

A. In other words, the government reservation bureau holds or held a portion of the space in this particular car.

Q. Are there any cars that are not government reservation cars on the trains leaving here?

A. Yes.

Q. The diagram would be the same as the ones you have here, with the exception that it would not have some particular marking on it?

A. That is right.

Q. What is that mark?

A. GRB in these cases.

Q. Government Exhibits 2 and 3 for identification are the official records of the Miami office of the Florida East Coast Railroad Company?

A. They appear to be, yes.

Q. Do you know of your own knowledge whether it would be possible for the diagram clerk or ticket agent to release this government space without a release from the government agency?

A. They would have the right to release it.

Q. Could they do it?

A. Yes, sir.

Q. I will ask you to explain to the jury and to me the situation with reference to this ODT rule of 30 days?

A. I don't know whether it is an ODT rule or not. I believe it is an agreement between the carriers and the military services wherein the military authorities indicate that they cannot determine their requirements more than thirty days in advance.

Q What was that agreement?

A. The agreement was to provide for the needs and requirements of the armed services

Q. What was the rule or agreement with reference to the 30-day reservations?

A. They agreed that they would not accept requests for reservations more than thirty days in advance

Q. Who agreed?

A. The carriers and the armed services

Q. Will you explain to the jury how that works with reference to John Doe getting a reservation? Suppose I wanted to call up today, the 29th of January, and wanted to leave here for North Carolina? How would that work with reference to this thirty-day period?

A. Let's take some date around the 29th of January Suppose we make it January 25th—

Mr. Riley:

What year?

A. This year

Mr. Riley:

I object to him making it any year other than December, 1943 and the months of January, February and March of 1944

A. The situation at that time was the same as at the present time. Now if you called on January 25th, 1944—

The Court:

Take some time in 1943

Mr. Duhaime:

The indictment was to February, 1944. Let's take some period in January, 1944

The Court:
All right.

A. We will say that you called on January 15, 1944 for a reservation for February 16, 1944. The diagram clerk would inform you that requests for reservations more than thirty days in advance would not be accepted; so it would be necessary for you to file your request for February 16th on January 16th.

Q. In other words, there had to be a thirty-day period intervening between your request for reservation and the date that you could make your reservation?

A. That is correct.

Q. Then with reference to your statement that the trunklines opened at six o'clock (and you had, I believe you said, some forty trunk-lines), from half an hour to an hour after these trunklines opened up the reservations after that period were gone; is that right?

A. Yes, sir.

Mr. Duhaime:
Mark this for identification.

(Said instrument marked Government's Exhibit Number 4 for Identification.)

Q. I hand you government's exhibit 4 for identification and I will ask you to explain to the jury what that exhibit is or what it is a part of?

A. This is what we describe as a passenger's check of a sleeping car ticket. These tickets are for the most part made in three parts—one small stub to the agent for his accounting purposes, a part for the Pullman conductor so that he can handle his record, and this is the check which goes to you to identify the accommodation which you are using. This particular stub covers a lower berth.

Q. What is the marking on the back of the ticket?

A. The marking on the back of the ticket is the ticket seller's die or date stamp; it is a dim impression, but it indicates which particular clerk sold this particular ticket.

Q. Does each clerk have his own die stamp?

A. Yes, sir.

Q. And those die stamps are recorded in your office?

A. They are recorded in the office of the ticket agent.

Q. What is the purpose of the die stamp?

A. To make him responsible for the issuance of this ticket or any other ticket which he might issue.

Q. Then, as I understand it, these tickets come in three parts?

A. For the most part, yes.

Q. One part to the ticket agent, one part to the Pullman conductor and one part to the passenger?

A. Yes, in that particular form of ticket. Some tickets, as you know, will be of considerable length, depending on the destination of the passenger.

Mr. Duhaime:

The government at this time would like to offer in evidence Exhibits 1, 2 and 3 which have been marked for identification.

Mr. Riley:

The defendants object to the introduction of Exhibits 1, 2 and 3 for identification, because no connection has been shown between these diagrams and any of the defendants.

The Court:

I think they are admissible for illustrative purposes, but not as substantive matter on either of the indictments.

Mr. Duhaime:

We offer them for illustrative purposes.

The Court:

Gentlemen of the Jury, that means that the substantive facts incident to the sale of berth space or seat space by any one of these individuals is not proved by these exhibits. We have not gone into the individual facts surrounding the individual transactions in connections with the sale of any particular space, but these exhibits are before you as illustrative of the method of doing business, as testified to by this witness.

(Said documents were admitted in evidence as Plaintiff's Exhibits 1, 2 and 3, respectively.)

Mr. Duhaime:

Your witness, Mr. Riley.

Cross Examination.

By Mr. Riley:

Q. In respect of this thirty-day reservation period, when applicants are only permitted to make a reservation for train space not exceeding thirty days in the future,—do you recall that that rule did not go into effect until February 1, 1944?

A. February 1, 1944?

Q. Yes.

A. The thirty-day rule?

Q. Yes.

A. That rule went into effect in October or November 1943, I believe.

Q. Have you anything up at the railway ticket office from which you could refresh your recollection in that regard?

A. I believe so, sir.

Q. Would you mind getting it at some later period and bringing it back here to the Court?

A. If you wish, yes.

Q. These reservations that you call GRB are government reservations, practically speaking about them?

A. Yes.

Q. May I ask in the month of December, 1943 and January, February and March of 1944, what time the Champion was scheduled to leave Miami, each section?

A. As I recall, sir, the coach section was scheduled to leave at seven-thirty and the Pullman section at eight-fifteen, I believe.

Q. In regard to this GRB transportation, this government transportation, was it not the rule and the practice down at the depot that if space on either the reserve seat passenger coach or the Pullman space was not taken at seven o'clock of the morning of departure, then the space was allowed to be purchased by the general traveling public?

A. No; the release time was always ahead the departure.

Q. How many hours before departure in regard to these particular trains?

A. Mr. Riley, I don't know whether to answer your question or not; to be very frank with you, it might involve a matter of military secrets.

Q. That is for the Court to decide. If the government objects, let him state his objection.

The Court:

You may answer.

A. These trains are supposed to release at three o'clock in the afternoon.

Q. Of the day preceding departure?

A. That is right.

Q. Have you any order or memorandum down at the ticket office or in your office from which you can refresh your recollection in that regard?

A. Yes, I believe so.

Q. Then you mean to say that if the government reservation bureau had made reservations for soldiers to leave on the 4th of January, 1944, in order for the Florida East Coast railroad to hold that space the government bureau would have to notify the Florida East Coast railroad sometime prior to three P. M. on January 3, 1944?

A. Mr. Riley, I believe there is somewhat confusion there. I believe you will find that actual reservations for the military services were held until practically train time. Now that is what you are speaking about, is it not?

Q. Yes.

A. I was speaking, when I answered Mr. Duhaime, about space not needed or not used.

Q. Let me interrupt you. Just disregard Mr. Duhaime, as I am asking the questions now.

A. All right; I am sorry.

Q. Now, I am going to repeat the question to you that I first asked: The reserve coach section of the Champion in January, February and March of 1944 left Miami at seven-fifteen, and the Pullman section left Miami at eight-fifteen; is that correct?

A. Yes.

Q. If the government had reserved space on either that coach train or the Pullman train, and it was not taken up at seven o'clock in the morning the day of departure, was not that space permitted to be purchased by the general public from seven to seven-thirty and eight-fifteen, the respective times of departure of the two trains I have mentioned?

A. Correct. In other words, the time limit on the reservations would have expired at seven o'clock in the morning and therefore that space would have been available.

Q. Now if there was a reservation missed for Pullman space or reserve coach space, and at the time the reservation was made the ticket office could not accommodate the prospective purchaser, would that prospective purchaser's name go down on some list other than the diagram?

A. Not unless the request had been received for that particular departure.

Q. Let's assume that space had been reserved for civilians on January 4, 1944 on the Champion departing, respectively at 7:30 A. M. and 8:15 A. M., and that reserved space was not taken up by the prospective purchasers, when would that space be put on the general public market for sale—ten hours, twelve hours or twenty-four hours before departure of the trains?

A. That would depend on the expiration date, sir.

Q. The trains leave on January 4th.

A. You are speaking of a specific date?

Q. Yes—the trains left on January 4, 1944, one section at 7:30 and the other at 8:15. Now, I have a reservation on the 7:30 train and Mr. Dressler has a reservation on the 8:15 train. When do I have to pick up that reservation?

A. May I ask on what date you have made the reservation?

Q. Any date within the thirty-day period?

A. You are presumed to have picked your reservation up within 24 hours.

Q. So if Dressler and Riley do not pick up their reservations by 7:30 A. M., January 3, 1944, the ticket agent has the right to sell them for the train departing at 7:30 A. M. January 4, 1944—within that 24-hour period?

A. Yes.

Q. When space goes on sale for one of these Pullman trains, is it all put on the market here in Miami, Florida, or is some held back?

A. Some of it might be assigned to Hollywood, Fort Lauderdale, West Palm Beach and so on.

Q. You do not sell that space here in Miami?

A. No.

Q. In addition to those allocations, is any other of this reserved space kept off the market when that train leaves Miami; if so, for what purpose?

A. Yes, there is some held.

Q. For what purpose?

A. Mr. Riley, you went to New York last spring or last summer and I took care of your request.

Q. I hope I didn't pay you for it.

A. You sure didn't.

Q. That was because you had a couple extra seats left that you had held back?

A. That is correct.

Q. And it is a general custom down there to keep a drawing room or a couple seats on each of these trains until about two minutes or a short time before departure?

A. Yes.

Q. Now suppose somebody came to one of my clients here five minutes before the departure of a train, and Miss Lee knew that there was a drawing room or a bedroom on the train departing on January 4th that had not been allocated to anybody, to whom would she have to apply, if to anybody, for permission to sell that space?

A. She wouldn't have to apply to anyone. If the space was available at that time she would be authorized to dispose of it.

Q. Right up to the time of departure?

A. Yes, sir.

Q. If you can determine from some written order down there at the railway office when the thirty-day rule went into effect, I would appreciate it if you would bring that back with you sometime during the day.

A. Do you wish me to bring it personally or send it?

Q. You may send it.

A. I will be glad to.

Mr. Riley:
That is all.

Re-Direct Examination.

By Mr. Duhaime:

Q. Mr. Riley brought out the fact that it is a general custom to hold back a few seats for such distinguished persons as Mr. Riley and perhaps myself. Is that the general custom by the ticket sellers?

A. No; that space is not handled by them.

Q. With reference to the matter of cancellations: I understood you to say that you have cancellations in the morning one hour before train time as to the government space, and cancellations approximately 24 hours as to the civilian space.

A. That was brought out in Mr. Riley's question. It has always been our practice in the case of military services to extend them every possible consideration, and we shall continue to do so, and that consideration entails our holding such space close to train time.

Q. Now as to the civilian space, where it is released or you have to pick it up 24 hours before departure—

A. I think we should make that clearer.

Q. I wish you would.

A. He has been speaking of January 4th, and I will use that date again, if I may. We will say that Mr. Riley made a reservation on December 15th for January 4th; Mr. Riley not being in military service and not having secured his reservation through the GRB, he would be requested to pick up his reservation by five P. M. the next afternoon, which would be December 16th.

Q. That is what you mean by the 24-hours?

A. That is right.

Q. You mean 24 hours after he made the reservation?

A. Approximately.

Q. If Mr. Riley didn't pick it up on the 16th, what would happen to it?

A. It would be canceled and given to someone else.

Q. To whom would it be given?

A. To the next man on the list.

Mr. Duhaime:

That is all.

The Court:

For the purpose of clarity, I have this in my mind, and if I am wrong about it I want you to tell me: I have in mind that there is a difference between what is technically a cancellation on the one hand and a surrender of a request on the other hand; in other words, if an individual, having arranged all of the preliminaries and has purchased Pullman space on a particular train, and has paid his Pullman fare, several days before he intends to make the trip goes to the railway agency and tells them he will not be able to make the trip and requests the return of the money,—to me that sounds like a cancellation.

A. That is right.

The Court:

Now if an individual who has a return railroad ticket only but desires to travel Pullman, gets up early in the morning and telephones to this switchboard at 6:10 in the morning, and he is told to come down at a certain time, and then he doesn't appear at the designated time, is there a calling of a name or number or is he just forgotten? Now, I would call that more in the nature of failure to redeem something; is that right?

A. He is supposed to come there before five o'clock and he fails to do so, therefore we strike him out on a cancellation list.

The Court:
You would call that a cancellation?

A. That is right.

(By Mr. Riley):
Q. Assume that I purchased a ticket on December 14, 1943, and I went down to your office the next day and picked up my ticket and made a Pullman reservation for a train leaving Miami on January 10th at eight or nine o'clock in the evening, and that I notified your office on January 9th that I couldn't use it, that would throw a reservation back on your hands.
A. Yes.
Q. And if such a thing were done, wouldn't that particular reservation be open for sale to the general public?
A. Yes, sir.

(By Mr. Duhaime):
Q. And you would call someone off the waiting list for that ticket?
A. That is right.

Mr. Duhaime:
You may come down.

(Witness excused.)

Thereupon: DAVID CURRY (Colored). a witness on behalf of the government, having been duly sworn, was examined and testified as follows:

131 Direct Examination.

By Mr. Duhaime:
Q. What is your name?
A. David Curry.

Q. Where do you live, David?

A. Miami city.

Q. How long have you lived in Miami?

A. Since 1940.

Q. Are you married?

A. I am.

Q. Do you have a family?

A. A wife and five children.

Q. On or about December, 1943 and January, February and March of 1944 where were you employed?

A. At the Arlington Hotel on the Beach.

Q. And what was your position at the Arlington Hotel?

A. Superintendent of Service.

Q. What were your duties as Superintendent of Service?

A. To obtain reservations for guests of the hotel.

Q. How long did you hold that position?

A. I imagine since around May, 1943.

Q. That was at the Arlington Hotel?

A. Yes, sir.

Q. Did you ever hold a similar position at any other hotel?

A. At the Gaylord Hotel.

Q. When was that?

A. Before I went to the Arlington, during the year 1943.

Q. How long were you at the Gaylord Hotel?

A. I guess about two months.

Q. As Superintendent of Service at the Arlington Hotel in the month of November, 1943, what was your procedure in reference to obtaining reservations?

A. I would call the diagram room of the Florida East Coast and the Seaboard.

Q. What time would you make that call?

A. I would call practically from six o'clock all through the day, sir.

Q. Did you have any difficulty in obtaining reservations?

A. Occasionally then I had some but not so much.

Q. In November it wasn't so bad?

A. No.

Q. What about the month of December, 1943?

A. Well, it was pretty tough in the latter part of December.

Q. It was tough. What do you mean by that?

A. Well, you would call in the morning and they would be all sold out; if you didn't call at exactly six they would be all sold out; if you called later, they didn't have no reservations.

Q. Where did you call?

A. I would call the Florida East Coast diagram room or the Seaboard diagram room.

Q. Do you know Miss Lee?

A. Yes, sir.

Q. When was the first time that you knew Miss Lee, and what was the occasion of knowing her?

A. Well, I met Mr. Cole and he told me that he had to take care of Miss Lee for the reservations, so I told him that if I had to take care of him and Miss Lee, that, I might as well just take care of Miss Lee just between me and her instead of three of us.

Q. What do you mean by "take care"?

A. Give them some tips for the reservations I would get.

Q. What do you mean by tips for the reservations?

A. Just like that; if somebody gave me five or ten dollars to get them a reservation, I would give her half of the tip for getting me the reservation.

Q. Had you known Miss Lee before you met Mr. Cole?

A. Only that I knowed her voice on the telephone.

Q. Do you know the defendant, Mr. Dewhurst?

A. Yes, sir.

Q. When was the first time that you heard of or met Mr. Dewhurst?

A. The last of December, 1943, around December.

Q. December of 1943?

A. Yes, sir.

Q. Before or after Christmas?

A. I think it was before Christmas.

Q. Tell us about that meeting?

A. Well, he was a colored ticket seller at the Florida East Coast.

Q. You mean he sold tickets at the colored window, to colored people?

A. Yes, at the Florida East Coast.

Q. Tell what transaction took place in his presence.

A. In Mr. Dewhurst's presence?

Q. Yes.

A. Well, I would either call down there to get my reservation or I would come over to pick it up; he would call me if he got the reservation and I would come over and pick it up.

Q. How much did you pay for the reservations?

A. Sometimes I would give him a package of cigarettes, and sometimes I would give him maybe two dollars, and later on I went to giving him more.

Q. Did you ever talk to him about Miss Lee?

A. I did, sir.

Q. What did you talk about Miss Lee?

A. I told him to give Miss Lee an envelope.

Q. What was in the envelope?

A. I think I remember it was five dollars.

Q. Was that for a reservation?

A. That was a Christmas present.

Q. A Christmas present?

A. Yes, sir.

Q. After this Christmas present did you have any conversation with anyone with reference to Miss Lee?

A. I did.

Q. Tell us about that, and with whom was it?
A. Mr. Larry Cole.

Mr. Riley:
I object to any conversation he may have had with Mr. Cole unless some of these defendants or all of them were present, or at least some of them.

The Court:
Sustained.

Q. Was Miss Lee pleased with her Christmas present?

Mr. Riley:
I object to that because he has not said he met Miss Lee.

The Court:
It calls for a conclusion. You may ask him what was done and said. Sustained.

Q. Did you ever have any conversation with Miss Babe Lee or Mr. Dewhurst in reference to money?
A. Yes, sir.
Q. Tell us about that?
A. I told Mr. Dewhurst to call Miss Lee down where I could give her more money for the reservations.
Q. Where was Mr. Dewhurst on this occasion; where did you see him?
A. At the colored ticket window at the FEC depot.
Q. You were there?
A. Yes.
Q. And you asked him to do what?
A. Call Miss Lee down.
Q. Did she come down?
A. Yes, sir.
Q. What did you do?
A. I gave her some money.

Q. How much money?
A. I think it was twenty dollars.
Q. Was this after Christmas?
A. I think it was, sir.
Q. Why did you give her the twenty dollars?
A. Well, she had been getting me a lot of reservations and I hadn't given her anything.
Q. Had she complained?
A. No, she hadn't complained. I don't guess I can tell you that because it would include Mr. Cole.
Q. That would also include Mr. Cole?
A. Yes, sir.
Q. Did you ever have any conversations with Miss Lee about obtaining reservations?
A. I call her at her house.
Q. How did you know the number?
A. She told me.
Q. How many times did you call her at her house?
A. I don't know; it was a lot of times.
Q. A lot of times?
A. Yes.
Q. Was this for reservations?
A. Yes, it was about reservations.
Q. And what month and what year were these telephone calls made to her home?
A. I believe it was in 1944, around January.
Q. January, 1944?
A. Yes, sir.
Q. Did you get the reservations you asked for?
A. I got the coach reservations, yes.
Q. Did Miss Lee ever speak to you about Mr. Cole?
A. Yes, sir.
Q. What did she say?
A. She said that Mr. Cole didn't know so much about the reservations and to leave him out of the picture.
Q. Leave him out of the picture?
A. Yes, sir.

Q. Did she tell you anything about the other Superintendents of Service?

A. Yes, sir.

Q. What did she tell you?

A. She said some of them were paying as high as ten dollars for a coach seat, and maybe twenty for a section.

Q. Twenty dollars for a section and ten dollars for a coach seat?

A. Yes, or a bedroom compartment or drawing room.

Q. Do you know the defendant Red Howitt?

A. Yes, I know Mr. Red.

Q. Did Miss Lee ever talk to you about Red Howitt?

A. Yes, sir.

Q. What did she say about him?

A. That any money I had to leave for her to give to Mr. Howitt.

Q. Did you ever give Mr. Howitt any money for Miss Lee?

A. I don't recall giving him any money.

Q. Did you ever give Miss Lee any reason why you didn't wish to deal with Mr. Howitt?

A. I told her that Mr. Red was working on other work and I felt that he could never help me, and that was the reason I still didn't want to fool with him, because he was working around on the white side.

Q. Did you tell her who you preferred to give the money to?

A. To Mr. Dewhurst.

Q. Why?

A. Because he was there at the colored side.

Q. Did Miss Lee agree as to how the money was to be given?

A. She told me to leave it with Mr. Larry Cole's wife.

Q. Did Miss Lee ever tell you anything about Mr. Dewhurst with reference to giving the money or leaving the money with Mr. Dewhurst?

A. She told me but I don't recall. I think she said that she didn't trust him.

Q. Did you ever pay Miss Lee any money direct?

A. Yes, sir.

Q. How much?

A. Ten dollars one time and twenty another time.

Q. You handed the money to her?

A. Yes, sir.

Q. And where did you make this payment or payments?

A. At her house and at the hotel.

Q. You paid her at her house and at the hotel?

A. Yes.

Q. Did you ever make her any payment at the station?

A. I don't recall at the station.

Q. Did you ever leave any money for her at the station?

A. Yes, sir.

Q. Who did you leave the money with?

A. Mr. Dewhurst.

Q. Do you recall an incident sometime in February, 1944, when you had a conversation at the Arlington Hotel with Miss Lee and Mr. Howitt?

A. Yes, sir.

Q. Tell us about that.

A. Well, I guess it was around nine o'clock or before when Miss Lee and Mr. Red came to the hotel. She said hello, and I said hello to them. Mr. Red told me that Miss Lee said I wanted a seat to Chicago for a guest of the hotel, and he said, "Here's a reservation; all you have to do is take the ticket down to the ticket office and they will change the ticket number on the reservation in lieu of ticket" that the lady had.

Q. Did you pay anything for this reservation at that time?

A. Well, I gave Miss Lee twenty dollars that night.

Q. In the presence of Mr. Howitt?

A. Yes, sir.

Q. Did Miss Lee talk to you about the difficulty of obtaining reservations that night?

A. Yes, sir.

Q. What did she say?

A. She said that it was awful hard to get reservations, that the army didn't release space early, and that they couldn't give me any reservations in the Army car because they had to have a seat number to go in there.

Q. Would you recall—I know it is a long time back—the seat or coach ticket that you got that night?

Mr. Riley:

If you have the number, just ask him.

Q. Do you recall whether or not you obtained a ticket on a train from Miami to Chicago leaving at five-thirty P. M. on March 7th?

A. Yes, sir. I think it was seat 30 in Car SW-4.

Q. How long before this time had you asked Miss Lee for this reservation?

A. I don't recall, sir.

Q. Do you recall the name of the person that you got this ticket for?

A. No, sir; she lived in room 133 at the Hotel.

Q. Was her name Wineberg?

A. I think it was, yes.

Q. How much did you give Miss Lee for getting reservations, all told?

A. I don't know exactly.

Q. Approximately?

A. It was about a hundred or a hundred and twenty-five dollars, I imagine.

Q. Do you recall a conversation with Miss Lee with reference to a Miss Hanna, in regard to getting a reservation for Miss Hanna?

A. No, sir.

Q. Do you recall a conversation that you had with Miss Lee with reference to a Miss White?

A. Miss White?

Q. Yes.

A. I believe I remember talking to her about it, but the exact conversation I don't remember.

Q. Was it with reference to obtaining a reservation?

A. I believe it was from the Pullman diagram room.

Q. Did you talk to Miss Lee at that time?

A. Yes, sir.

Q. Do you recall what she told you?

A. No, sir.

Q. Do you recall talking to Miss Lee about a reservation and she referred you to Miss White?

A. Yes, I remember that.

Q. Tell us about that?

A. I don't remember the exact conversation, but I remember Miss Lee telling me about Miss White.

Q. What happened; why did you call Miss Lee?

A. Because I needed, I believe, a compartment for somebody.

Q. For a guest at the hotel?

A. Yes.

Q. And you called Miss Lee?

A. I did.

Q. Could she get the reservation for you?

A. No, sir.

Q. What did she do?

A. I believe she told me to call Miss White.

Q. Did you call Miss White?

A. I don't remember.

Q. Did you get the reservation?

A. I got so many that I don't remember which ones I did get.

Q. Did you ever have a conversation with Miss Lee with reference to the guests going directly to the ticket office to get tickets?

A. Yes, sir.

Q. What did she tell you to do?

A. She told me to tell the guests to go down and see Mr. Red and he would fix up the reservations for me.

Q. He told you to tell the guests to go to Mr. Red, or take them there?

A. That is right.

Q. Did Miss Lee ever call you and ask you if you wanted any reservations?

A. I don't remember.

Q. Did she ever call you and ask you whether you needed a coach seat to Chicago during February?

A. I think she called me and gave me reservations to Chicago and also to New York.

Q. Do you recall going to Mr. Dewhurst one day to get a reservation when you needed space badly?

A. Yes, sir.

Q. What did he tell you that day?

A. He told me he didn't have any, but he would see what he could do. He called the diagram room or somewhere, to get me a Pullman compartment, section or whatever it was, to Washington and New York. I think he got me a section and when he gave me the section then I think I gave him some money, see, and he said to me that when I give him money the other fellows takes it all upstairs and he didn't get anything; that he gave it all to the others.

Q. Did he ever complain to you about the service you were rendering him, the money you were giving to him?

A. He just said that someone else would give him maybe ten dollars for a seat or something like that.

Q. That someone was giving him better prices?

A. That someone else would give him a better price than I was giving him.

Q. Did you make any new arrangements then as to the price you gave him?

A. I gave him five dollars for a seat and ten dollars for a Pullman.

Q. Five dollars for a coach seat and ten dollars for a Pullman?

A. That is right.

Q. Was that satisfactory to him?

A. It seemed to be.

Q. Do you recall a guest at the hotel by the name of Miss Rothenburg?

A. Yes, sir. I think it was Mr. Rothenburg.

Q. What transaction took place with him?

A. He gave me his ticket; he came down and was going to stay about two weeks, and he had to have thirty days in order to get a reservation. He told me to get him a reservation and he would give me fifteen or twenty dollars; that he didn't care what it cost him to get the reservation, just to go ahead and get it. So I told Mr. Dewhurst to try and get me a compartment, drawing room or section either to New York or Washington for Mr. Rothenburg. He got me a section and told me to come over and pick it up, which I did, and I think I gave him fifty dollars for it; I mean ten dollars for it.

Q. Mr. Dewhurst?

A. Yes, sir.

Q. Do you recall a Mr. Albert Kahn from the Savoy Plaza Hotel?

A. Yes, sir.

Q. Tell us about that transaction, David.

A. He wanted a seat to Chicago. He told me to go over to the station and he would go there with me and if I got him a seat he would give me eight dollars, I believe. That was for the five-thirty train, I believe. So I went around to the window and got, I believe, Mr. Dewhurst to call and see if there was a cancellation, telling him that Mr. Kahn had given me eight dollars, and that I would split it with him, and eventually I got it.

Q. Did you give Mr. Dewhurst his split?

A. Yes, sir.

Q. Did you ever see anyone else give Mr. Dewhurst money at the station?

A. I don't know whether they were paying him, but I did see other people giving him money.

Q. Who did you see giving him money?

A. Several of the colored boys gave him money.

Q. You don't know whether that money was for the tickets or for some other purpose?

A. No, sir.

Q. Did you ever see Zack Johnson give him any money?

A. Yes, sir.

Q. Do you know what that money was for?

A. No, not for sure.

Q. Do you recall a Mrs. Victor?

A. Yes, sir.

Q. Tell us about that transaction, David.

A. She wanted a reservation to go home. She was in the lobby of the hotel and every ten or fifteen minutes she would ask me if I had her reservation. She first started saying she would give me five dollars if I get her a reservation, because she had to get home. She said that she had called everywhere and couldn't get one. Then she started crying around the hotel there, and kept on crying, and so I finally got her a reservation.

Q. Who did you get that reservation from?

A. I don't remember who I got it from, sir.

Q. Did you go down to see Mr. Dewhurst about it?

A. Well, I'm sure I did.

Q. Did you get it from him?

A. I am not sure.

Q. How much money all told have you given Mr. Dewhurst for reservations, as best you can recall?

A. I gave him quite a bit, approximately around three hundred dollars, I imagine.

Q. Did you receive a like sum from the guests of the hotel?

A. Yes, sir.

Q. Did you have any dealings with any other ticket agents besides those you have testified about?

A. Sometimes at other railroad stations I did.

Q. How many other ticket agents would you say you had dealings with besides these?

A. Five or six, I guess.

Q. Some at the Seaboard?

A. Yes, sir.

Q. Did any of these defendants ask you for this money?

A. Well, no, sir; they wouldn't just ask me for five dollars, but sometimes they would say they could get maybe five or ten dollars for such and such a reservation.

Q. He would tell you that he could get that from somebody else?

A. Yes, sir.

Q. Then you would give him that price?

A. (No audible answer.)

Q. Did you find it impossible to obtain reservations without this procedure?

A. Yes, almost impossible.

Q. Before Christmas of 1943 were you able to obtain these reservations without this procedure?

A. Yes, sir.

Q. Had you been able the year before that to obtain these reservations?

A. Yes, sir.

Q. You always obtained tips from your guests for getting the reservations?

A. That's right.

Q. But in other years you didn't have to give anything to the railroad agents?

A. No, sir.

Q. This money that you gave these agents, was that in excess of the railroad fare?

A. Yes, sir.

Mr. Duhaime:
Your witness.

Cross-Examination.

By Mr. Riley:

Q. The sum and substance of your testimony is as follows: You got tips from the guests at the Arlington Hotel and divided those tips with some of these defendants; is that right?

A. Well, some of it.

Q. Wasn't that your general practice?

A. Not all of the time.

Q. In other words, I am making it easier for you to answer: you made a profit for every reservation you obtained, didn't you?

A. Yes, sir; I had to make a profit or I wouldn't fool with them.

Q. You are not under arrest, are you?

A. No, sir; I got a subpoena.

Q. I say, you are not under arrest?

A. I don't know.

Q. Well, have you been in the jail house?

A. I went some place; I don't know where it was.

Q. You know where the jail is here?

A. Not the Miami jail.

Re-Direct Examination.

By Mr. Duhaime:

Q. Were you arrested in this case by the Marshal?

A. No, sir.

Q. Were you put under bond?

A. No, sir.

Q. Do you work for the railroad company?

A. No, sir.

Mr. Duhaime:

That is all. You may come down, David.

(Witness excused.)

Thereupon: ELLIOTT ELKIN, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

150 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. Elliott Elkin.

Q. Where is your present station?

A. Camp Hood, Texas.

Q. You were subpoenaed here to testify in behalf of the government?

A. Yes.

Q. How long have you been in the United States army?

A. Just about six months.

Q. How old are you?

A. Eighteen.

Q. What is your home state?

A. Michigan.

Q. In December of 1943 where were you living?

A. I came down to Florida about the 18th of December.

Q. What did you do when you got to Florida?

A. I stayed with my father; I was on vacation.

Q. Where did your father live at that time?

A. 2830 Fairgreen Drive, Miami Beach, Florida.

Q. During the month of December did you obtain employment at Miami Beach?

A. I did.

Q. Where did you become employed at Miami Beach?

A. Crest Hotel.

Q. In what capacity?

A. You might call it bellboy or superintendent of service, either one; I was the only one there.

Q. Had you ever done that type of work before?

A. As a bellboy.

Q. In what hotel?

A. Cadillac.

Q. During the month of January, 1944 were you still employed at the Crest Hotel on Miami Beach?

A. I was.

Q. What was your position at that time?

A. The same.

Q. What were your duties as superintendent of service there at that hotel?

A. To render any service the guests might request.

Q. Did you have occasion to render any service with reference to obtaining ticket reservations on railroads?

A. I did.

Q. Before this time had you ever had occasion to render any such service as that?

A. No, sir.

Q. This was a new job to you?

A. Right.

Q. What was the first experience that you ran into in this new job of obtaining ticket reservations?

A. A gentleman—I believe it was the manager of the hotel—approached me and said that he had a friend who wanted a ticket, and I called the Seaboard Railway and I was able to obtain the reservation.

Q. Do you know the defendant Stanley Howitt?

A. Yes.

Q. Is he in the Courtroom?

A. Yes, sir.

Q. Sitting there at this table?

A. Yes.

Q. When was the first time that you heard the name Stanley Howitt?

A. You mean the date?

Q. The month and year.
A. January.
Q. Of what year?
A. '44.
Q. What was the occasion of hearing his name?
A. After I got my first reservation I had a few more people approach me for reservations, and I was unable to obtain them. In other words, I was just lucky on my first one. Then I had a further talk with the manager of the hotel about it—

Mr. Riley:
I object to anything the manager of the hotel told him.

The Court:
Objection sustained.

Q. Were you directed to Mr. Howitt?
A. Yes, sir.
Q. Did you personally contact Mr. Howitt?
A. I believe it was by telephone.
Q. How did that take place?
A. I called up the FEC.
Q. Who did you ask for?
A. Stanley Howitt.
Q. Did a voice answer the phone?
A. Yes, sir.
Q. Did he say who he was?
A. No, he didn't.
Q. Did you have a conversation with the person you asked for as Mr. Howitt?
A. I did.
Q. What did you tell the voice?
A. That would have something to do with the manager.

The Court:
You may tell what you told the person on the telephone.

A. I told him that the manager of the hotel that he used to work for had told me about him, stating that he might be able to help me get some reservations.

Q. What did the voice tell you with reference to the reservations?

A. I believe he said that they were pretty hard to get at the time, as I remember offhand.

Q. Was there any conversation with reference to paying for these tickets?

A. No, sir.

Q. Was any mention made of remuneration?

A. No.

Q. Did you purchase any reservations through Mr. Howitt?

A. I did.

Q. Did you pay him anything over and above the railroad price?

A. Yes.

Q. How much did you pay him?

A. At different times different prices.

Q. How much did you pay him in any one particular case?

A. Two or three dollars.

Q. How much did you pay him all told, as best you recall?

A. $75.

Q. Was this for more than one ticket?

A. That's right.

Q. Do you recall a Mrs. Wiener?

A. I do.

Q. Did you obtain any reservation for her?

A. Yes.

Q. Tell us about that.

A. Well, she wanted three seats to go to Chicago on the Southland or City of Miami, and I called Mr. Howitt and reserved the seats, received the seats, if I remember correctly.

Q. How much did you pay for them over and above the railroad price?

A. I believe it was five or seven dollars.

Q. To Mr. Howitt?

A. That is right.

Q. Did you receive something for your trouble, too?

A. Yes, I did.

Q. Do you recall how much you received for the three reservations, approximately?

A. You mean after all expenses were paid?

Q. Yes.

A. About three dollars.

Q. Did you ever have any conversation with Mr. Hewitt or Mr. Howitt rather, with reference to sending people to him?

A. On a few occasions he didn't have the reservations right off and said he would probably have them just before train time, and to send the people down there and he would see that they got reservations.

Q. Were you paid anything by these people for that information?

A. Yes.

Q. Do you know whether he was?

A. I couldn't swear to it either way.

Q. In what manner were these payments made at the ticket window?

A. When I would pay for the tickets I would just say "keep the change" or something similar to that.

Q. Was that the arrangement you had with Howitt?

A. I didn't have any set arrangement.

Q. How many times a week did you have dealings with Red Howitt after January 17, 1944?

A. Daily.

Q. On each occasion you gave him something over and above the tariff?

A. I wouldn't see him every day. I would usually call him in for reservations, and would see him three or four times a week.

Q. Each time you saw him would you give him money over and above the tariff?

A. No.

Q. Not always?

A. No, sir.

Q. A majority of the times you would?

A. Yes, sir.

Q. Do you recall the day that you called Mr. Howitt and were informed that he was at the racetrack?

A. I don't recall the date.

Q. Will you tell the jury about that particular instance?

A. I called the ticket office and asked for Mr. Howitt after one or two o'clock and they said he could be located at the racetrack.

Q. What did you do then?

A. I called his home that night, I believe.

Q. What happened when you called his home?

A. I don't remember exactly what happened.

Q. Did you get a reservation from him in response to this telephone call to his home?

A. No, I don't believe so.

Q. Did you ever get any reservation from him by calling his home?

A. No; he was never there.

Q. Do you recall getting reservations for Mr. and Mrs. Merson?

A. Yes, sir.

Q. Tell us about that transaction, please.

A. I believe they wanted to go to Baltimore. At first Mr. Merson had an airplane reservation and at the last minute he couldn't take the plane, and he wanted to go home with his wife, so I obtained reservations for both of them.

Q. Who did you obtain them from?

A. Howitt.

Q. How much did you pay him over and above the railroad price?

A. I believe I took Mr. Merson down to the station on the morning the train left, because I couldn't get the reservation until just before train time, and I believe he gave him five dollars.

Q. Who gave him the five dollars?

A. He did.

Q. Mr. Merson gave him five dollars?

A. Yes.

Q. He was at the window with you?

A. Yes, sir.

Q. Did you later make any arrangements with Mr. Howitt in reference to calling in the mornings?

A. I would usually call him right around noon time, just before he went off, to see if any reservations had been released or canceled by anybody else.

Q. Would you give him a list of the names?

A. He would find out what he had or I would tell him what I need—either way.

Q. Did you usually receive the reservations?

A. Sometimes.

Q. How soon after you would make the call?

A. Usually just before train time.

Q. What was the longest time you had to wait for reservations from Mr. Howitt?

A. About five days.

Q. Did you ever receive any on making the direct call?

A. Yes.

Q. Did you ever talk to Mr. Howitt about any other railroad employee?

A. No, I did not.

Q. Did you ever ask Mr. Howitt who you could call in his absence?

A. Yes.

Q. What was his answer?

A. Miss Lee.

Q. He told you to call Miss Lee?
A. Yes, sir.
Q. Did you ever call Miss Lee?
A. I did.
Q. What did you tell Miss Lee?
A. I told her that Mr. Howitt had told me to call her in case he wasn't there and that she might be able to help me with the reservations.
Q. Did she ever give you any reservations?
A. Yes, sir.
Q. With or without delay?
A. I can't remember that.
Q. Were you able to get the reservations when you called Miss Lee immediately or did you have to wait?
A. Sometimes.
Q. Sometimes immediately?
A. Yes.
Q. Did you ever talk to her about taking care of her in the matter of remuneration?
A. Yes.
Q. And what did she tell you to do?
A. She just said give it to Mr. Howitt.
Q. Did Miss Lee ever tell you to call her home?
A. Yes.
Q. What was that particular conversation?
A. I would usually tell her what reservations I needed for the next few days.
Q. What was the conversation with reference to her telling you to call her home?
A. She said she didn't have time to take all of the orders I needed at the time while she was working at the station and to contact her at home later on in the evening.
Q. Did she give you her number?
A. She did.
Q. Did you call her at home about the reservations?
A. Yes, sir.

Q. Did you get the reservations when you called her at her home?

A. Very seldom.

Q. Did you get any at all?

A. Yes.

Q. What did she tell you in reference to paying for those reservations?

A. The same as before—see Mr. Howitt.

Q. Did you ever talk to Mr. Howitt over Miss Lee's telephone?

A. Yes, I did.

Q. What was that occasion, or was there more than one?

A. Well, she just asked me if I wanted to talk to him, or something to that effect—that he was there at the time.

Q. And you did talk to him?

A. Yes.

Q. Was it in reference to reservations?

A. Not with him, no.

Q. Did you ever see any other person, any other superintendent of service or bellboy dealing with Mr. Howitt in your presence?

A. I have seen other bellboys down there, yes. I have seen them buy tickets.

Q. You don't know whether he paid them—strike that. You don't know whether they paid him anything for them or not?

A. No.

Q. Do you know a Mr. Omansky?

A. Yes.

Q. Did you ever obtain any reservations for him?

A. Yes.

Q. Do you recall from whom you obtained the reservations?

A. I believe it was Mr. Howitt but I am not sure.

Q. How many transactions, approximately, would you say you took care of with reference to obtaining ticket reservations with the Florida East Coast?

A. Five or six a week.

Q. Over a period of how many months?

A. From about January 10th or 15th to around the first of March.

Q. Were these amounts that you paid to Mr. Howitt and Miss Lee in excess of the railroad fares?

A. Yes.

Q. Did you work for the railroad company?

A. No, I didn't.

Q. On this transaction of Mr. Omansky's did you pay either Miss Lee or Mr. Howitt any money?

A. I believe so, yes.

Q. Do you recall how many tickets and what that particular transaction was?

A. I believe it was four or five tickets, coach seats.

Q. Do you recall where they were to?

A. I believe it was to Hartford, Connecticut, or to some place in the New England states.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. Some of the pay guests at the hotel gave you tips for buying reservations?

A. That is right.

Q. You gave the tip and hoped you would get the reservations?

A. You might call it a tip, yes.

Q. You said you didn't have any arrangement with them, didn't you?

A. No, sir.

Re-Direct Examination.

By Mr. Duhaime:

Q. What did you mean when you said you might call it a tip?

A. I don't know what you would call it, sir.

Q. You don't know whether it was a tip or not, but you knew that you had to pay?

A. Yes, sir.

Q. Or you would not get your reservations?

A. Most likely.

Re-Cross Examination.

By Mr. Riley:

Q. You are not correct in saying that, because didn't I hear you testify that you got some reservations without pay?

A. Yes, but I would make it later on.

Q. Did you tell him "I got three or four reservations that I didn't pay you for"?

A. I would usually say I will take care of it later and he would nod.

Q. But he didn't ask you for any money, did he?

A. No.

Mr. Riley:

That is all.

(Witness excused.)

The Court:

We will take our recess until two o'clock. Gentlemen of the Jury, I caution you to refrain from discussing the case among yourselves and suffer no one to talk with you about the case until it is all over. Take a recess, Mr. Marshal.

(Trial adjourned to 2:00 P. M. of the same day.)

Afternoon Session.

Miami, Florida,
January 30, 1945—2:00 P. M.

Trial resumed pursuant to adjournment.

Appearances: Same as heretofore noted.

The Court:
Call your next witness:

Thereupon: DONALD C. FRANKEL, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

165 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. Donald C. Frankel.

Q. Are you a Special Agent of the Federal Bureau of Investigation?

A. I am.

Q. How long have you been in that capacity, Mr. Frankel?

A. Approximately two and a half years.

Q. In the spring of 1944, from January 1st on, where were you stationed?

A. In the Miami office of the Federal Bureau of Investigation.

Q. Do you know the defendants Red Howitt and Miss Lee?

A. I have seen them.

Q. Will you state to the Court the first time you saw these

A. It was on February 22, 1944.

Q. Will you state what happened?

A. About eight o'clock in the evening I was in the Arlington Hotel, having gone there to interview David Curry, the superintendent of service there at that time. When I arrived there he was in consultation with two persons who I did not know at the time but subsequently found out that they were Mr. Howitt and Miss Lee. He stood there for about half an hour in conversation with them. I was interested in interviewing him, so I went over to the cigar stand, which was immediately adjoining the superintendent of service's table at which Curry, Miss Lee and Mr. Howitt were standing. I bought a pack of cigarettes and looked over to see what they were doing, and just at that time I saw Curry hand Miss Lee two ten dollar bills, and I saw Mr. Howitt hand Curry an envelope which looked like—

Q. Never mind what it looked like. You saw an envelope passed?

A. Yes, sir.

Q. What next took place?

A. I didn't want to appear too inquisitive, so I went back to my seat in the lobby and waited until Mr. Howitt and Miss Lee left.

Q. Then did you talk to David Curry?

A. I did.

Q. Did you get anything from David Curry?

Mr. Riley:

I object to that, if your Honor please.

The Court:

Sustained. If he obtained an envelope when he talked to Curry, an envelope with a ticket in it, I would have no objection to them introducing the ticket and envelope.

Q. Did you later obtain this envelope that you talked about?

A. I did.

Q. What was in it?
A. A coach ticket reservation.
Q. What did you do with the coach ticket?
A. I photographed it.
Q. Yourself?
A. Yes, sir.
Q. What did you do after you photographed it?
A. I returned the ticket to Curry and had the photographs developed and placed in the file.

Mr. Duhaime:
Mr. Clerk, mark these photographs for identification.

(Said photographs were marked Government's Government's Exhibits 5 and 6 for Identification.)

Q. I hand you government's exhibits 5 and 6 for identification and will ask you, without reading what is on them, to identify these exhibits?
A. These are the photographs that I took.
Q. Of what?
A. Of the ticket that Curry handed me, stating that it was the one that Howitt and Miss Lee had handed to him in my presence.

Mr. Riley:
How many days after the transaction that you have just related was it before you obtained the ticket from Curry?

A. I obtained it that evening.

Mr. Riley:
I have no objection to the ticket and envelope going in evidence.

The Court:
Admitted.

(Said envelope and ticket were marked and filed in evidence as Plaintiff's Exhibits 5 and 6.)

Mr. Duhaime:
Your witness.

Mr. Riley:
No questions.

(Witness excused.)

Thereupon: ALBERT DEVERICH, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

169 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.
A. Albert Deverich.
Q. What is your present address?
A. Here in town?
Q. Where you came from?
A. 801 North Sweetzer Drive, Hollywood, California.
Q. Were you subpoenaed here to testify in this case in behalf of the government?
A. Yes, sir.
Q. Do you know the defendant Stanley Howitt?
A. Yes.
Q. Is he in the Courtroom here?
A. He is.
Q. When was the first time you met Mr. Howitt?
A. The first time I met Mr. Howitt?
Q. Yes.
A. I met him one morning at the Florida East Coast station.

Q. What was the object of this meeting?

A. While I was employed at the South Seas Hotel as superintendent of service Mr. Morris Katz, who was the superintendent just before I went there, was leaving his job, and I was going to take over his place and handle the tickets for the guests. I couldn't get very much information out of Mr. Katz, so I followed him to the station one morning and saw him contact Mr. Howitt, and later on I contacted Mr. Howitt myself.

Q. What did you talk to Mr Howitt about?

A. I told him that Mr. Katz was leaving and that I wanted to take over his business at the hotel. Mr. Howitt said it was all right and that we would get along all right.

Q. A few days later did you take anyone over to the station?

A. Yes, sir; I took a man and his wife over and got them a couple seats to New York.

Q. Who did you get the reservations from?

A. Howitt.

Q. Did you pay anything to Mr. Howitt for these reservations over and above the railroad price?

A. Yes, sir.

Q. How much?

A. Five dollars a seat.

Q. Ten dollars total?

A. Yes, sir.

Q. Did you ask Mr. Howitt anything with reference to money?

A. At the time I was paying him?

Q. Yes.

A. I asked him, "Red, how do we stand", and I believe he said it should be ten dollars, so I took care of him.

Q. Did you ever pay Mr. Howitt any money at any other time?

A. A couple other times, yes—I had dealings with him.

Q. Tell us about those, please.

A. One morning I took a woman there a short time after that, and I think she got a seat, and I just gave him five dollars for it and left. Another time, as I recall, was a lady staying at the hotel with her daughter—

Q. Was that Mrs. Rosalind Diener—

A. I am pretty sure that is the name.

Q. Do you recall where she was from?

A. No, I don't.

Q. You did obtain a reservation for her and her daughter?

A. Yes, and I think it was a drawing room or bedroom.

Q. Did you obtain it from Howitt?

A. Yes.

Q. How much did you pay Mr. Howitt for this transaction?

A. I think it was $15.

Q. Was there any conversation at that time as to the money that you should give him or owed to him?

A. I asked him how we stood.

Q. What did he say?

A. Well, he said it should bring fifteen dollars.

Q. Did you give him the fifteen dollars at that time?

A. Yes.

Q. This money that you claim you paid to Mr. Howitt, did you consider that money tips?

Mr. Riley:

I object to that as calling for a conclusion.

The Court:

Sustained.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. When you first gave Howitt the ten dollars, how much did you get from the guest for whom you purchased the tickets?

A. Sir, I got quite a bit above that.

Q. Can you tell us the exact amount you got?

A. No, but I wouldn't lose money on the deal.

Q. If he got twenty-five dollars from—strike that. If he got ten dollars from you, then you got about twenty-five from the guest?

A. Possibly double what he got.

Q. And that same thing would apply to the sale to Rosalind Diener; if you gave him fifteen, then you got thirty from the guest?

A. Possibly.

Q. When you would go over with these guests to get reservations, would you pay for the reservations or would the guests pay?

A. It would be their money; I didn't use any of my own money.

Q. You didn't come back later and hand Howitt ten or fifteen dollars?

A. No, sir; it would be taken care of then.

Q. Right in the window at the same time?

A. Yes.

Q. The people would give you enough to pay for their tickets in the first place, and then give you about twenty dollars extra, and you would split the twenty with Howitt: is that the way it was?

A. Well, they asked me—they knew there was an additional cost to obtain these reservations.

Q. You don't have to go into that. Just answer my question. They would give you twenty dollars in excess of the tariff rate?

A. It wasn't given in that manner, sir.

Q. How was it given?

A. I would name the approximate price that I would have to give and they would give me that there, and usually right after that they would reimburse me, give me a tip according to whatever they thought was right.

Q. They would give you the ten dollars to give to Howitt and later on they would give you additional money?

A. Yes, sir.

Q. And that additional money was never less than what you handed over to Howitt?

A. At times, yes.

Q. You were getting the major portion of the tips that you received from the guests?

A. Yes, because most of my reservations were last minute cancellations and I didn't have to get anything for those.

Mr. Riley:

That is all.

Re-Direct Examination.

By Mr. Duhaime:

Q. Did you ever have any dealings with Miss Lee?

A. No, sir.

Q. This money that you paid to Red Howitt, was that over and above the price of the tickets?

A. Yes, sir.

Mr. Duhaime:

That is all.

(Witness excused.)

175 STIPULATION.

Mr. Duhaime:

It is stipulated by and between counsel for the government and the defendants that if MRS. ROSALIND DIENER and daughter, of Cleveland, Ohio, were present, they would testify substantially as follows:

That they departed from Miami, Florida, at 9:00 P. M. on March 15, 1944 on the Havana Special on the Florida East Coast Railroad to New York City, occupying a bedroom in Pullman car A, No. F-120; that said reservation was obtained by them through Albert D. Deverich, Superintendent of Service at the South Seas Hotel, and that they paid over and above the purchase price of the reservation the sum of ten dollars to Albert D. Deverich, and that the railroad ticket for securing this reservation was on the Seaboard, and that for this purpose she gave Deverich sixty or seventy dollars—that is, it was necessary for her to secure a railroad ticket on the Florida East Coast, and for this purpose she gave Deverich the sum of sixty or seventy dollars; that several days later he returned the money to Mrs. Diener, advising her that he had not had an opportunity to purchase the ticket; that she proceeded to the railroad station herself where the Pullman reservation was examined by a ticket seller who advised her that it had been sold to Howitt; that she then went to the ticket office and on the ticket being examined it was stated that it was in order aside from the minor error, and that she therefore secured a ticket on the Florida East Coast Railroad and occupied the reservation secured by Deverich.

Mr. Riley:

I agree that they would so testify, but I do not agree to the materiality of the testimony.

Thereupon: MORRIS JACK GOLDBERG, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

176 Direct Examination.

By Mr. Duhaime:

Q. Please state your full name

A. Morris Jack Goldberg.

Q. What is your address at the present time?

A. 31 South Second Street, Brooklyn, New York.

Q. Were you subpoenaed to testify in behalf of the government in this case?

A. I was.

Q. During the months of November and December of 1943, where were you employed?

A. At the Nemo Hotel, Miami Beach, Florida.

Q. In what capacity?

A. Superintendent of Service.

Q. State your duties there as Superintendent of Service.

A. To take care of my guests and do whatever they wanted done. If they wanted to make a trip or go home; it was my job to get them transportation.

Q. In that respect did you have dealings with certain railroad ticket agents?

A. I did.

Q. Do you know the defendant Red Howitt?

A. I do.

Q. Is he in the Courtroom?

A. Yes.

Q. When did you first contact Mr. Howitt?

A. Well, I had seen him on and off.

Q. In January of 1944 did you have any contact or conversation with Red Howitt?

A. I got space from him.

Q. Tell us about getting space from him.

A. Well, it goes back before New Year's.

Q. Go ahead.

A. In December and November space was easy to get. I went to see Mr. Howitt at that time and he gave me space, but as time went on, as the season came on, it was harder and harder to get space. So one day I saw Mr. Howitt and I asked him could I see him later, and he said that he was busy right then. A little later I think he went out to breakfast and I went along and had breakfast with him. I told him who I was and where I was working at, and I told him I was having a hard time getting space, and that I would appreciate it if he would give me anything I needed, and "at the end of the season I will take care of you". He told me then that if he could help me at anytime, he would be glad to do so. He told me to call the reservation room or I could come down, and that if he had anything he would really help me out.

Q. On or about January 18th did you receive any reservation from Howitt?

A. I couldn't be positive about the date, but in January I did receive some.

Q. Did you pay him anything for them?

A. I threw him something occasionally.

Q. What do you mean by that?

A. He gave me space right along.

Q. Did you ever give him any money for these reservations?

A. The first time I took the money and put it in an envelope and I asked him for space and he gave it to me, and then I would say, "Here is something for yourself", put it in an envelope and went away.

Q. Did you get the reservation at that time?

A. No.

Q. You didn't buy anything—you just gave him the envelope?

A. That's right.

Q. Was that money you put in the envelope for tickets or was it for Red Howitt?

A. I figured that the favors he had done me justified me in showing my appreciation, so I gave him something.

Q. How many other contacts did you have with Howitt in regard to getting reservations?

A. Whenever I needed something I would first call the FEC and then if I didn't get them I would go down to the station.

Q. What was the most that you ever gave him at one time?

A. Around five dollars, but I am not sure.

Q. How much did you give him all told, just roughly?

A. About twenty or twenty-five dollars, I imagine.

Q. Do you know Miss Lee?

A. I do.

Q. Is she in the Courtroom?

A. Yes.

Q. When was the first time that the name Miss Lee was brought to your attention?

A. On the telephone.

Q. Tell us about that.

A. On the phone when you call up for reservations the operator says "Florida East Coast", and you tell her what you want, coach or Pullman. Sometimes when you get them on the phone they will tell you their name and some don't. I happened to hear that her name was Miss Lee, and she gave me space that time.

Q. Did you ever hear Red talk about Miss Lee?

A. Yes, sir.

Q. What did he say?

A. He asked me one time where I got the space.

Q. You had gotten space but not from him?

A. Yes. For instance, I would get reservations at the window. I used to leave the hotel early in the morning, and I had to go to Mr. Howitt's window because his was

about the only one open at that time; the rest of them had signs out "Today's trains only".

Q. Did you ever give anything to Miss Lee directly or through Mr. Howitt for these tickets or reservations?

A. I used to give her candy and stuff like that—give it to Howitt to give to her.

Q. Did you ever attend any function in the presence of Mr. Howitt and Miss Lee?

A. Yes.

Q. Tell us about that.

A. I made an appointment with Mr. Howitt and Miss Lee to go out with me one evening, with me and my wife. I went over to Miss Lee's house and I saw Mr. Howitt's car there, and we went from there to a place and got a few drinks, and from there we went to the Beach and then back home, my wife and I.

Q. This party was on you?

A. That's right.

Q. On the morning of February 25, 1944 did you have any meeting or conversation with Miss Lee?

A. I met Miss Lee but I don't remember what date it was.

Q. Was it in February, 1944?

A. It is hard for me to say.

Q. Tell us what took place.

A. I met Miss Lee in front of the City Hall. I met her there and talked with her, walked around the corner there. I think she was kind of late for work and I was walking with her down towards the station, and as we walked along I handed her an envelope and said, "Here's something for you". She said she was late for work, and we were then practically at the station, so she got there and said good bye and went upstairs. When I first met her that morning I said to her, "You are kind of late", and she said she couldn't help it, that she was late and had to take a taxi to come down. She got out of the taxi about a block from where I met her, and that is where I

said, "Here's something for you"—handing her the envelope.

Q. What was in it?

A. Some money.

Q. How much?

A. I don't recall offhand, but I imagine it was around ten dollars, something like that, I guess.

Q. Had you previously called her to make this appointment in front of the Courthouse?

A. Yes, sir.

Q. What did you do after Miss Lee went upstairs?

A. I went around front.

Q. Front of what?

A. The station.

Q. What did you do then?

A. Got my tickets, my space.

Q. Who did you get them from?

A. Mr. Howitt.

Mr. Duhaime:

Your witness.

Mr. Riley:

No questions.

(Witness excused.)

The Court:

Call your next witness.

Thereupon: J. DUDLEY LOCKREM, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

182 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. J. Dudley Lockrem.

Q. Are you a Special Agent of the Federal Bureau of Investigation?

A. Yes, sir.

Q. Now, how long have you held that position?

A. Slightly over four years.

Q. Where were you stationed during the month of February, 1944?

A. I was assigned to the Miami office of the Federal Bureau of Investigation.

Q. Do you know Morris Goldberg?

A. I do.

Q. Do you know the defendant, Flora Post Lee?

A. I do.

Q. Do you know the defendant Howitt?

A. Yes, sir.

Q. On or about the morning of February 25, 1944, where were you stationed at that time?

A. That morning I drove a car and parked just a short distance from Miss Lee's home, arriving there about eight o'clock. I had previously been watching her activities, and at nine-thirty on the morning of February 25th a cab came up to her house and she came out of the house and got in the cab and proceeded down Southwest First Street toward the city of Miami. The cab stopped in front of the Dade County Courthouse and she got out and immediately walked over to the sidewalk and there in front of the Courthouse she met Morris Jack Goldberg. I was but a short distance behind the cab and I proceeded around the Courthouse and parked my car on the east side of the Courthouse. Miss Lee and Jack Goldberg, however, walked west on Flagler Street and around the west side of the Dade County Courthouse. I did not see any money pass or any envelope pass. I parked the car on the east side of the Courthouse and I went around the Courthouse and observed Miss Lee and Goldberg walking together. She was walking quite fast, as though she late for work, and they walked up the station platform from Northwest

First Street. They stood a few minutes at the door which leads up to the diagram room, the door right there at the bottom of the stairway, and then Goldberg walked over to the Florida East Coast city ticket office (I don't mean city ticket office; I mean the depot ticket office), and he stood there in a line which contained about twelve or more people, standing in line for approximately ten minutes. Then he stepped out of the line, which was a line in front of the ticket seller's window, and stepped up to a frosted glass window at another ticket seller's window, which was not all the way open. The window was open about six or eight inches from the bottom, raised about this high (indicating), and he stooped down and peeked under the window and called to someone. Pretty soon Red Howitt came to the window, and there was some envelope passed at that time which I couldn't see or identify. He was there just a few minutes and then Goldberg left and proceeded down Flagler Street and stopped at the Seaboard ticket office, and eventually went back to Miami Beach to the Nemo Hotel, taking a Miami Beach jitney.

Q. Did you ever see Mr. Goldberg in the presence of Miss Lee at any other time?

A. Yes. I had been surveilling Miss Lee for possibly five days, and one evening a cab stopped at Miss Lee's house. I don't know who stepped out of the cab at that time, but as the cab left I stopped the driver and asked him who it was—

Mr. Riley:

I object to him stating what the driver may have told him.

The Court:

Sustained.

Q. Have you finished?

A. Later that evening the surveillance was taken over by some other of our agents, and I cannot of course testify to what they observed. On several other occasions, and I might say practically every night, Howitt would drive up in his car, and on one occasion I know he carried a box of bottles into the house. On another occasion he had a case of beer which he took out of the trunk of his car and carried into Miss Lee's house. He was a frequent caller at her home.

Mr. Duhaime:
Your witness.

Mr. Riley:
No questions.

Thereupon: LOUIS W. BANACH, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

186 Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. Louis W. Banach.

Q. And your address?

A. 1507 Metropolitan Avenue, Bronx, New York.

Q. Were you subpoenaed to testify here in behalf of the government?

A. Yes, sir.

Q. In February of 1944 where were you employed?

A. The Broadripple Hotel.

Q. Where is that located?

A. Miami Beach, Florida.

Q. In what capacity were you employed?

A. Superintendent of Service.

Q. What were your duties as Superintendent of Service?

A. Purchasing transportation for guests of the hotel.

Q. Did you hold that job for any length of time?

A. I got that job in December, 1943.

Q. Had you had a similar job at any time?

A. I was a bell captain.

Q. What hotel?

A. Hotel Statler in Washington, D. C., sir.

Q. Do you know the defendant Stanley George Howitt?

A. Yes, sir.

Q. Is he in the Courtroom?

A. He is.

Q. Do you recall a transaction wherein a guest by the name of Mrs. Horwitz was involved?

A. Yes, sir.

Q. Tell the jury about that transaction, what took place.

A. I don't know the exact date of the happening, but I remember Mrs. Horwitz asking me to get her transportation to New York. As it was below the thirty day limit and she had to leave, she asked me to try my best to get the transportation for her for this particular date. I went to the station with her on that particular certain morning and purchased a ticket from Stanley Howitt. It was an upper berth, I believe, to New York.

Q. Did Mrs. Horwitz give you anything for your trouble?

A. Yes, sir.

Q. How much?

A. She gave me ten dollars for myself and ten dollars for Mr. Howitt.

Q. Was this money given to Mr. Howitt in her presence?

A. Yes, sir.

Q. Will you tell the Court and jury how you happened to get the reservation from Howitt?

A. I came there early in the morning and asked if there was any last minute cancellation, as this lady would like to leave on this 8:15 train. He said he had nothing at the present time, but that I should stop by the window later on and if there was one he would be glad to give it to me.

Q. Had you known Red Howitt before this time?

A. I just stopped there a couple times before that.

Q. Had you gotten reservations from him before?

A. Yes, sir.

Mr. Duhaime:

Your witness, Mr. Riley.

Mr. Riley:

No questions.

188 Thereupon: DAVID OSMANSKY, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. David Osmansky.

Q. Where is your home?

A. South Norwalk, Connecticut.

Q. Were you subpoenaed to testify in behalf of the government?

A. Yes.

Q. Did you come here from Connecticut?

A. Yes.

Q. During the month of January, 1944, did you come to Miami?

A. I did.

Q. How long were you in the city?

A. Fourteen or fiifteen days.

Q. Where did you stop here?

A. I stopped at the Crest Hotel.

Q. Do you recall when you arrived here?

A. I left Norwalk on the 5th of January, and I got here on the sixth, at night.

Q. On what line did you come here?

A. I came on the B&O to Washington and there changed to the Champion.

Q. What did you do on your arrival in Miami?

A. In coming down people were saying that it was pretty hard to get reservations back, so right away I tried to get my reservation as soon as possible. I went to the railroad station and tried to get my reservations for two weeks and they told me they couldn't give them to me, not until I waited thirty days. I tried that for two or three mornings and the same thing happened, so I started to get worried about getting back home.

Q. What did you do when you started getting worried about getting back home?

A. I kept asking different people how to get back home, and I was in the lobby of my hotel and I talked to different people, and they said, "Speak to the bellboy and he might be able to do something"—so I spoke to the bellboy—

Q. Do you remember the name of the bellboy?

A. Elliott.

Q. Was that the soldier boy who was here a few m es ago?

A. Yes, sir.

Q. Go ahead.

A. He told me that he thought he could get me reservations but that the four would cost me fifty dollars, and I told him that I thought that was a little high, and he said, "I will see what I can do". A few days went by and I stopped him again, in fact, I stopped him every day, and this time he said to me, "The best I can do is to get you four reservations for forty dollars", so I told him that was all right and to go ahead and get them. I told him to get me one for the 19th, to get two for Mr. Spitzer and his wife for the 21st or 22nd and one for another gentleman for the 25th, I guess.

Q. This forty dollars that you spoke of, was that over and above the railroad tickets?

A. Yes, sir. We already had our return tickets.

Q. Then these were for Pullman or coach seats?

A. Coach seats, or chairs.

Q. All right; did he ask you for this amount over and above the railroad price?

A. That's what he did.

Q. What happened when you got to the train?

A. I didn't have a seat. I had a forged reservation. The conductor grabbed my ticket because somebody was already in my chair. I asked the conductor what was I to do, and he said he would do the best he can for me. He said, "I will get you back home". He gave me a seat which I had to give up at Palm Beach, but he kept putting me in different seats which were vacant along the line at the different places.

Q. Did the railroad conductor say anything to you about the ticket?

A. That I was fluked.

Q. Did he say anything to you about it?

A. He took the ticket and said he would report it.

Q. How long have you been coming to Miami?

A. I've been coming here since 1928.

Q. Each winter?
A. Nearly every winter, yes.
Q. Did you ever have to pay any money for your space over and above the railroad tariff?
A. No.

Mr. Duhaime:
That is all.

Cross Examination.

By Mr. Riley:
Q. So Mr. Howitt fluked you?
A. Somebody did.

Mr. Riley:
That is all.

(Witness excused.)

192 Thereupon: HELENE HANNA, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:
Q. Your name is Mrs. Helene Hanna?
A. Yes.
Q. What is your address?
A. 799 N. W. 45th Street, Miami.
Q. On February 1, 1944, where were you employed?
A. At the Florida East Coast diagram room.
Q. What was your position in there?
A. Diagram clerk.

Q. How many diagram clerks would be on duty at one time?

A. I don't know.

Q. More than yourself?

A. Yes; possibly ten or fifteen.

Q. Do you know Flora Post Lee?

A. Yes, sir.

Q. Did she work in the diagram room when you worked there?

A. Yes, sir.

Q. About February 1, 1944, did Miss Lee approach you and talk to you about railroad reservations?

A. *No, she didn't approach me.*

Q. Did she talk to you?

A. We always talked about reservations.

Q. Please answer my question.

A. We were working there at the board one day and she said something as a joke that if we could get some reservations we could make money.

Q. Did you think it was a joke??

A. It was a joke.

Q. To you?

A. Yes, sir.

Q. Did she ask you to turn over any space to her at that time?

A. Not at that time. She asked me at times for space when she had customers for it.

Q. Did you give her space?

A. I have given her space, yes.

Q. Did she ever call you at your home for space?

A. No.

Q. Did you ever call her at her home for space?

A. No.

Q. Will you explain to the jury how you were able to give Miss Lee space?

A. On cancellations.

Q. Did you ever enter any fictitious names in these cancelled spaces?

A. I believe there was one time when Miss Lee asked me for some space. I didn't know what name she wanted to insert, so I put some name in there.

Q. That was for her reservation?

A. Concerning or for her customer.

Q. Did Miss Lee ever tell you that she would give you something for your trouble?

A. No.

Q. She mentioned nothing like that to you?

A. No.

Q. Did she ever give you any money?

A. No, sir.

Q. Did you have charge of the GRB space at any time?

A. Yes, sir.

Q. On or about February 27, 1944, did Miss Lee have a conversation with you with reference to government reservation space?

A. She asked that when space was released to get her some space.

Q. Do you recall what she wanted on that day?

A. I don't remember.

Q. Did you get her space?

A. Yes, sir.

Q. Did any of the railroad officials call you in reference to that space?

A. Yes.

Q. Who called you?

A. Mr. Smart.

Q. About February 18th did any one call you at the diagram room and tell you he would give you fifty dollars for some space?

A. I was called in the evening.

Q. Did you recognize the voice?

A. No, sir.

Q. He didn't give his name?
A. No, sir.

Mr. Riley:
I move to strike both of those questions and answers.

The Court:
Unless it is connected up, it should be stricken.

Mr. Duhaime:
I will connect it up.

The Court:
You intend to connect it up by this witness?

Mr. Duhaime:
Yes. If I don't connect it, I will agree that it be stricken.

Q. Did you procure any space with reference to this telephone conversation?
A. Yes, sir.
Q. Tell the Court what you did in reference to this telephone conversation and this particular transaction.
A. I think that was a drawing room which was open at the time, and I assigned the space to him under the name he gave me.
Q. What did Miss Lee say about it?
A. I don't remember what it was, but I said something about this fellow having offered fifty dollars for space, and she wanted to know who it was and I told her that I did not know.
Q. What did she say?
A. She kind of nodded her head and kind of moved her mouth.
Q. What did she say, if anything?
A. I don't think she said anything.

Q. Did she make a guess as to who the person was?

A. She did nothing but nod her head and move her mouth.

Q. Did anything come out of her mouth when she moved it?

A. Not that I recognized.

Q. Have you ever gotten any space for Stanley Howitt?

A. Yes, sir. When he called in and space was open, it was assigned to him by whoever answered at the time.

Q. When Miss Lee nodded her head and moved her mouth you didn't hear her say who she thought it was that offered the fifty dollars for space?

A. No, sir.

Mr. Duhaime:

Your Honor, I see that I can't connect, so you may strike it.

The Court:

Gentlemen of the Jury, you will withdraw from your consideration the matter to which objection was made about the fifty dollars.

Mr. Duhaime:

That is all.

Mr. Riley:

No questions.

The Court:

Call the next witness.

197 Thereupon: JOHN F. LOOME, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. John F. Loome.

Q. Are you an agent of the Federal Bureau of Investigation?

A. Yes, sir.

Q. How long have you been such?

A. Four and a half years.

Q. Where were you on or about March of 1944?

A. In the early part of the month of March I was stationed on surveillance at the Florida East Coast depot in the city of Miami, Florida.

Q. Do you know the defendant Howitt?

A. I do, sir.

Q. Do you know Albert Deverich?

A. I do.

Q. During the early part of the month of March, 1944, did you have occasion to see these two persons in Miami?

A. I did, sir.

Q. Was that while you were on surveillance yourself?

A. Yes, sir.

Q. Tell us what you saw.

A. On the morning of March 2, 1944, at approximately five-fifteen I was doing surveillance duty at the Florida East Coast depot in the city of Miami. At the time I arrived at the depot a crowd had gathered in a line at window five, which had not as yet opened. At six o'clock the window opened, and Mr. Howitt was the ticket seller at that window. There was quite a line; there must have been thirty people in the line. I got into this line and

continued my observation. At approximately six-forty five this Albert Deverich came up and went through the line to the next window, number six, which was closed. He knocked on the window and it was raised a little bit, and Mr. Howitt and he engaged in a conversation, at which time Deverich slid through the envelope—I mean through the window—an envelope, and then the window was closed. Deverich hung around a little bit. I stood in line and in about ten minutes Deverich came back and signaled his presence and Howitt handed him an envelope over the heads of patrons in the line. The patrons in the line expressed indignation about the fact that he had gotten service over their heads, and they just laughed, both he and Howitt. Directly after he left with the envelope the parties in the line were told that there were no more reservations, so the line began to disperse.

Mr. Duhaime:

That is all.

Cross Examination.

By Mr, Riley:

Q. Do you know what those people in that line were getting reservations for, what particular dates?

A. No, sir.

Q. So therefore you don't know whether the people in that line could get any reservations that conflicted with the purported reservations that were handed through the window by Mr. Howitt?

A. No, sir.

Q. Therefore, if there were thirty people in that line wanting to get tickets to Jacksonville for the 4th of March, and the envelope that was given to Deverich was for the 5th of March, there would be no conflict between those people in the line and Mr. Deverich?

A. In answer to that question I can only say what I picked up in the Bureau during the period of my surveil-

lance over a period of some five or six days, and it was the general conversation among the various people who approached me that in order to get tickets you had to be there thirty days in advance. In other words, if you wanted a ticket for March 10th, you were supposed to put in your request thirty days in advance.

Q. Some of the people in that line might have had tickets that they wanted to surrender for cancellation?

A. Possibly, but I don't know.

Mr. Riley:

That is all.

Mr. Duhaime:

Come down.

(Witness excused.)

201 Thereupon: WILLIAM WOOTEN, called as a witness in behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. William Wooten.

Q. What is your address?

A. 821 West 30th Street, Hialeah.

Q. What is your present position?

A. Assistant Ticket Agent for the Florida East Coast at Miami.

Q. How long have you held that position?

A. About twenty months.

Q. Did you hold that position during December, of 1943, and January, February and March, of '44?

A. During December, yes; part of January and all of February I was Acting Ticket Agent.

Q. What are your duties as ticket agent?

A. Supervising the sale of tickets and ticket clerks in the office, and watching over everyone handling the public.

Q. Now, Mr. Wooten, how are the tickets that are sold identified as to the ticket sellers?

A. There is a die issued to each ticket seller, with a letter on it.

Q. What do you mean by "die"?

A. That is an impression that is put on the back of the ticket with a date stamp.

Q. Do you have one in your possession here?

A. I don't have one, but I have the impression of one here.

Q. I hand you Government's Exhibit No. 4 for Identification. Does there appear on that exhibit a die stamp?

A. Yes, sir.

Q. Is that the form of stamp that is used by the Florida East Coast ticket clerks under your supervision?

A. That is right.

Q. Will you explain to the jury how those die stamps are given out and what the purpose of the die stamp is?

A. As a ticket clerk comes to work at the depot our cashier issues one of the die stamps to him. He knows at the time that he gets the stamp that he is responsible for any tickets that that die stamp goes on.

Q. Are they cautioned by you or anyone as to the use of these stamps?

A. Yes, s.., they are cautioned that they are to take care of these stamps, because any tickets issued with this stamp—this die letter on them they are entirely responsible for.

Q. Do you have a list of the records of your office as to the die stamps issued during the month of December, January, February and March, of 1944?

A. Yes, sir.

Q. Will you read the list as to the defendants Terence P. O'Rourke, Stanley Howitt and Mr. Dewhurst?

A. Mr. Dewhurst was assigned die "O"; Mr. O'Rourke was assigned die "P"; Mr. Howitt die "S".

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. These die stamps are delivered to your ticket sellers so at the end of the day or at the end of the week you can check up and get from the man who has die "O" the amount of money as reflected by the tickets sold with that "O" stamp on, is that the idea?

A. Yes, sir.

Q. Don't you know, as a matter of fact, that tickets could be stamped "O" down there and then could be, in fact, delivered by the man holding the "P" stamp, who gets the money from the customer and then he can turn it over to the man holding the "O" die stamp?

A. That is true also.

Q. And that frequently happens, does it not?

A. Yes, that happens once in a while.

Q. From your check-up down there—First, you are familiar with this case, aren't you?

A. Yes, sir.

Q. You know it is about extra money being received by these clerks over and above the tariff?

A. Yes, sir.

Q. You know that is what it involves?

A. Yes, sir.

Q. Did the Florida East Coast Railroad or the Pullman Company get any of that extra money, or was it given to these young men and this young woman?

A. No, sir.

Mr. Riley:

That is all.

(Witness excused.)

Mr. Duhaime:

In order to keep the continuity of witnesses, we have several witnesses available, but they depend upon the testimony of Mrs. Merson, who is here from, I believe, Cleveland, Ohio. I hate to say it, for the sake of the Chamber of Commerce, but she is sick; she got sick since she got here; she can't be here today; she is in the hotel under a doctor's care. They promised us they would have her here tomorrow. Rather than put the testimony in out of order, we prefer to wait until tomorrow. We will continue now with the O'Rourke case. It will be a little out of order as to that, but we would rather do that in order to keep the evidence all together.

Mr. Riley:

If they will submit to me what they expect this witness to testify to I will agree it be inserted here, just like I have with regard to these other witnesses.

Mr. Duhaime:

We would much rather have the witness testify. I would rather have the jury hear her.

Mr. Riley:

I withdraw the offer.

Mr. Duhaime:

We appreciate that. We may have to if she is still sick tomorrow, but we hope she will be here tomorrow. Call Mr. Bieler.

205 Thereupon: DAVID BIELER, called as a witness in behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?
A. David Bieler.
Q. What is your address, home address?
A. 125 Ocean Avenue, Brooklyn.
Q. Brooklyn?
A. Brooklyn, New York.
Q. Did you come from Brooklyn to testify in this case?
A. I did.
Q. Under Government subpoena?
A. I did.
Q. Where were you on or about February, of 1944?
A. At the Jefferson Hotel.
Q. Is that Miami Beach, Florida?
A. Miami Beach, Florida.
Q. Had you come here for the winter season?
A. I had.
Q. Was your family with you at that time?
A. Yes, sir.
Q. Who does your family consist of?
A. My wife.

Q. What is her name?

A. Anna Bieler.

Q. Do you know Terence P. O'Rourke?

A. I do.

Q. Is he in the courtroom?

A. He is.

Q. Will you tell the first time you met Mr. O'Rourke, where it was and what took place, as near as you can recall?

A. I met Mr. O'Rourke at the Atlantis Hotel, in the company of Frank Miller, whom I was introduced—I was introduced to him.

Q. Talk a little louder.

A. I was introduced to Mr. O'Rourke by Frank Miller.

Q. Frank Miller?

A. Frank Miller.

Q. This was at a hotel at Miami Beach?

A. Yes, sir.

Q. Do you recall what month?

A. It was either the latter part of February or the beginning of March, I don't recollect.

Q. Did you have any conversation at that time or any time with Mr. O'Rourke with reference to getting a reservation for you on the trains?

A. Yes.

Q. First, I will ask you how did you know Mr. O'Rourke was connected with the railway company?

A. I was told by Mr. Frank Miller.

Q. In his presence?

A. In his presence.

Q. What conversation did you have with Mr. O'Rourke?

A. I asked him if he could get me a reservation.

Q. What kind of a reservation did you want?

A. I wanted a bedroom or a drawing room to go back to New York.

Q. Did you tell him when you would like to have it?

A. I said I would like to have it, I think it was, in the first week in March.

Q. Did you hear from Mr. O'Rourke about this request?

A. No. I have not heard from him. As a matter of fact, he told me that he could get it, I should not worry, and have a good time, and call him about three or four days before.

Q. Did you call him?

A. I did. He said it was kind of tough. I got no satisfactory answer.

Q. Did he call you again after that time?

A. He called me at the hotel two days before leaving time.

Q. What did he tell you?

A. He said that it was kind of tough, that he couldn't do anything for me. I said I depended on him, and the least he could do is get me a reserved seat. He said he would, that I should meet him the day of leaving and he would have it there for me.

Q. What day was that you were leaving, do you recall?

A. I don't recall.

Q. What happened when you went to the station? What time did you go to the station?

A. Seven-thirty.

Q. In the morning?

A. Seven o'clock in the morning.

Q. What happened?

A. I stood in line, and when I got to the window I said, "Hello" to him, and he said, "I have got your tickets." He gave me the tickets and I paid him for them.

Q. Did you pay him anything extra at that time?

A. I did not.

Q. You just took the tickets and walked away?

A. Yes, sir.

Q. What happened shortly after that?

A. While standing at the platform waiting for my train my name was called out on the loud speaker, that I was wanted in the ticket office. I immediately proceeded into the ticket office, and Mr. O'Rourke was waiting for me at the door. I asked him did he call for me. He said, "Yes", and he took me inside. He said that I had only paid him for the price of the tickets. I said, "Well, isn't that what you are entitled to?" He said, "No. I am entitled to something else." I said, "I didn't know that I have to give anything for those seats." He said, "I usually do." I took five dollars out of my pocket and I gave it to him and I walked away.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. When you took the five dollars out of your pocket and gave it to O'Rourke, how many minutes was that after you had purchased and paid for your ticket?

A. It might have been about half an hour.

Mr. Riley:

About half an hour. That is all.

Mr. Duhaime:

Come down.

(Witness excused.)

209 Thereupon: PAUL MILLER, called as a witness in behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. Paul Miller.

Q. What is your address?

A. 620 Fort Washington Avenue, New York City.

Q. Do you know Mr. David Bieler, who has just testified on the stand?

A. I was introduced to him in Miami.

Q. In Miami?

A. That is right.

Q. When was that?

A. In February.

Q. Of last year?

A. Of 1944.

Q. Do you recall the occasion?

A. My brother had introduced him to me.

Q. What is your brother's name?

A. Frank Miller.

Q. Do you know the defendant, Terence O'Rourke?

A. I do.

Q. How long have you known Mr. O'Rourke?

A. At least, about eight or nine years.

Q. Did you introduce Mr. O'Rourke to Mr. Bieler?

A. I didn't. I think my brother did at the time.

Q. Were you present?

A. I was present, yes.

Q. Do you recall where that was?

A. In the Atlantis Hotel.

Q. Did you tell Mr. Bieler what connection or what business Mr. O'Rourke was in?

A. I believe we must have told him at the time.

Q. Do you know a Henry Sobel?

A. I know him very well.

Q. Did you ever direct him to Mr. O'Rourke?
A. I did.
Q. For ticket reservations?
A. I did.

Mr. Duhaime:
That is all.

Mr. Riley:
No questions.

(Witness excused.)

212 Thereupon: HENRY SOBEL, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:
Q. What is your name?
A. Henry Sobel.
Q. What is your address?
A. 146 Central Park West, New York City.
Q. Do you know Mr. Paul Miller?
A. Very well.
Q. Do you know the defendant Terence P. O'Rourke?
A. I met him last February for the first time.
Q. Where?
A. At the hotel Atlantis, Miami Beach, Florida.
Q. How did you happen to meet him?
A. When I left New York Mr. Miller secured for me through the Atlantic Coast Line my reservation, and he said to me when you come to Florida we have a gentleman who is connected with the Ringling circus, a very dear

friend of mine. Mr. O'Rourke, and if you get in touch with him he will take care of you and see that you get your reservations back. When I came to Miami Beach I wrote Mr. O'Rourke a letter telling him that I was a friend of Paul Miller, and that I would appreciate it if he would take care of my reservation some six weeks hence. I didn't hear from him, so a week later I wrote him another letter, and then I received a telephone call in which he stated that the Miller boys were coming here from Sarasota, for me not to worry, that I had plenty of time and he would take care of my reservation.

Q. Did he get the reservation for you?

A. Yes.

Q. Do you recall when it was for?

A. It was for the last day in February or the 1st or 2nd day of March.

Q. What type of reservation was it?

A. Drawing room.

Q. To where?

A. New York City.

Q. Did you give Mr. O'Rourke anything over and above the railroad tariff price?

A. I did.

Q. How much did you give him?

A. Twenty five dollars.

Q. You didn't have any previous arrangement with him as to payment?

A. No, sir.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. Where did you pay Mr. O'Rourke the twenty-five dollars?

A. At the Atlantis Hotel, Miami Beach.

Q. And that was after you had purchased the space?
A. That was either three or two weeks before.
Q. Two weeks before?
A. Before I got my tickets, yes.

Mr. Dressler:
May I ask what count of the indictment the Miller transaction is on?

Mr. Riley:
If the Sobel episode is not mentioned in any count of the Indictment, I imagine it is introduced for the purpose of showing the course of conduct of the defendants. If that is the purpose, I have no objection.

Mr. Duhaime:
It is a similar transaction.

The Court:
We will take a recess, Mr. Marshal, to 9:30 tomorrow morning.

(Trial adjourned to 9:30 A. M., the following day, January 31, 1945.)

Miami, Florida, January 31, 1945. 9:30 A. M.

Trial resumed pursuant to adjournment.

Appearances: Same as heretofore noted.

(Jury polled.)

The Court:
You may proceed.

215 Thereupon: JOHN F. LOOME, previously called as a witness on behalf of the government, resumed the stand and was examined and testified further as follows:

Direct Examination.

By Mr. Duhaime:

Q. You have been previously sworn and have testified in this case?

A. I have.

Q. Mr. Loome, do you recall having apprehended Albert Deverich?

A. I talked to him one day in the office.

Q. Do you recall the date?

A. March 4, 1944.

Q. At that time did he have any tickets in his possession?

A. Yes; he displayed to me a Pullman ticket that he had secured for one of his guests at the FEC depot.

Q. Do you recall for what space that ticket was?

A. It was for Bedroom A in car F-120, to New York City, on the 15th of March, 1944; it was a Pullman ticket bearing number 2230, and on the reserve side of the ticket was a stamp known as a die stamp and it had the letter "S" on it.

Q. Can you tell what happened to that ticket?

A. I suppose he gave it to the guest.

Q. You didn't keep it?

A. No, sir.

Mr. Duhaime:

That is all.

Mr. Riley:

No questions.

216 Thereupon JOHN P. SMART, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. John P. Smart.

Q. Mr. Smart, what is your position?

A. Manager of the diagram room of the Florida East Coast.

Q. How long have you held that position?

A. Since June.

Q. Of this year?

A. Last year.

Q. What position did you hold with the Florida East Coast prior to that time?

A. Assistant Manager of the diagram room.

Q. What were your duties?

A. To assist the manager in the supervision of the force under our jurisdiction.

Q. Were you in charge of or did you have at any time in possession the diagrams used in the diagram rooms?

A. That is right.

Q. I hand you government's exhibit 3 which has been admitted in evidence in this case, and I will ask you to please explain that in detail to the jury.

A. Gentlemen, this is what we call Form 98 diagram; it is an exact plan of a Pullman car, consisting of ten sections, two double bedrooms and one compartment. A section is made up of an upper and lower.

Q. Can you tell from that diagram who occupied Bedroom "A" in car F-120?

A. According to the diagram the bedroom suite, which consists of bedrooms A and B, were reserved for a party

by the name of G-r (the third letter is a little blurred but it could be taken for an "e"'); the last two letters are "g"—in other words, sir, the name could be Gregg—G-r-e-g-g.

Q. Car F-120 on the Havana Special?

A. Yes.

Q. Explain that.

A. Bedrooms A and B were reserved for this party Gregg as a suite of rooms. The indication on the diagram is that it was made for two passengers in each compartment, meaning four people traveling.

Q. Does the chart show the ticket number?

A. For what, sir?

Q. For Bedrooms A and B?

A. Yes, sir; Bedroom A covered by ticket 2231 and Bedroom B by ticket number 2230.

Q. Pullman tickets?

A. Yes, sir.

Q. For what date?

A. March 15, 1944.

Q. On the Havana Special?

A. Yes, leaving at 9:00 P. M.

Q. Do you also have charge of or know the numbers allotted to the different diagram clerks?

A. Yes—give me a chance and—

Q. I show you government's Exhibit 1 and will ask you to explain that exhibit.

A. This is Form 63 diagram, and the style of the car is ten sections; one drawing room and one compartment. It is for a car F-73, Train 8, Miami to Washington, D. C., Thursday, February 10, 1944.

Q. Now I will ask you if you can tell me by that diagram in what name is the space for ticket Nos. 2601 and—

A. 2601 is lower six in car F--173.

Q. Who was it reserved for?
A. The name entered in the section is Goldberg.
Q. What about ticket number 1454?
A. Upper six.
Q. Also for Goldberg?
A. That is right.
Q. Will you state whether or not that is known as GRB space?
A. That was at one time GRB space?
Q. Does it show on the chart there when that space was released?
A. It would have been released at three o'clock on the afternoon prior to departure.
Q. Does it show on there the diagram clerk's number?
A. Yes.
Q. What number is that?
A. Eleven.
Q. Do you know who number eleven belonged to?
A. Miss Lee.

Mr. Duhaime:
Your witness.

Cross Examination.

By Mr. Riley:
Q. That GRB you referred to is government space?
A. Yes.
Q. Is that released any day before eleven A. M.?
A. It is supposed to be released at three P. M. of the day prior to departure of the train. It is supposed to be released at three or after the day prior to departure.
Q. Is that a rule that applies now?
A. That rule applied in 1944 and it still applies. I might add something to that, if you wish.

Q. I wish you would.

A. It was sometimes not always convenient at the time to make the actual release at three o'clock. Usually the custom was to get at it as quickly as possible. As you will notice, GRB doesn't appear in that space.

Q. This GRB space for the Champion leaving in sections at 7:30 and 8:15 in the morning during the spring of 1944, would that be released about 7:00 A. M. to the general public?

A. Provided there were no time limits on the diagram; it would depend on the time limit assigned to the reservation. For instance, if you reserved a berth on the eight-fifteen train the night before we would endeavor to have you pick it up as quickly as possible; if you couldn't do it, we would be lenient and give you to 7:45 or 8:00 o'clock, whichever you needed, but the point is that if they gave you 7:45 as a limit, as you know the lines were pretty long and we could very easily knock it off.

Q. If people came down to the station last spring and the train was due to depart at 7:30—say the people came down there between six and six-thirty or even seven o'clock, and they got in line and all of the space for the government wasn't used, then that space became available for sale to the public in general?

A. At three P. M. prior to the day of departure?

Q. Yes.

A. That is right.

Q. That was thrown open to the general public?

A. To the waiting list.

Q. This waiting list that you talk about, that was not put on cards like Exhibits 1 and 2?

A. It is a slip that is made out for people waiting for berths or seats.

Q. And then out of courtesy to the general traveling public would the diagram clerk telephone the different

people on the waiting list that they had that available space for the next morning?

A. We would endeavor to locate them if it could be done.

Q. That was as a general courtesy?

A. That is correct.

Q. There is nothing in the rules of the Interstate Commerce Commission that made you get in touch with people who were on a waiting list, is there?

A. That I don't know.

Q. If you got in touch with people on the general waiting list and those people didn't show up on the morning of the departure of the train, then that space can be offered for sale to the general public?

A. That is right; it would be left wide open and anybody could sell it.

Mr. Riley:

That is all.

The Court:

This exhibit which was admitted for illustrative purposes has gone beyond that, so I suppose there is no objection to the jury considering the exhibit in connection with this testimony that has been brought out.

Mr. Riley:

I will agree that those two exhibits 1 and 2, or whatever their numbers are, may be filed in evidence, although they were introduced for illustrative purposes.

The Court:

Call your next witness.

223 Thereupon: ZACK JOHNSON (Col.), a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Your name is Zack Johnson?

A. Yes, sir.

Q. Zack, where were you employed during the months of December 1943 and January, February and March of 1944?

A. At the Gaylord Hotel, 2700 Collins Avenue, Miami Beach.

Q. Zack, what position did you hold at the Gaylord Hotel?

A. Superintendent of Service.

Q. What were your duties as Superintendent of Service?

A. To procure tickets for the guests of that hotel?

Q. How long did you hold that position, either at this hotel or any other hotel?

A. I held it at the Gaylord Hotel starting November 1st, 1943.

Q. Had you held a similar position at any other hotels?

A. Bellboy, yes.

Q. What hotels?

A. The Miami Ritz, the Sands and several other hotels in New York City.

Q. Do you know the defendant, Mr. Dewhurst?

A. Yes, sir.

Q. Is he in the courtroom?

A. Yes.

Q. Do you know the defendant Stanley Howitt?

A. No, sir, but I have seen him around.

Q. Do you know the defendant O'Rourke?

A. Yes, sir. Now that they describe him to me, I remember him as being the man who sold me a ticket, the last man who sold me a ticket.

Q. When you got reservations for your guests, where would you go?

A. I would go to the FEC depot at the colored window.

Q. Have you ever got any reservations from Mr. Dewhurst?

A. Yes, sir.

Q. For your guests?

A. I did.

Q. How many did you receive from him?

A. I can't recall.

Q. More than one?

A. Oh, yes.

Q. More than a dozen or ten or less?

A. More or less. I can't recall just how many.

Q. You received a number of reservations from him for your guests?

A. Yes, sir.

Q. Did you ever have to pay Mr. Dewhurst any money over and above the railroad ticket fare?

A. Well, he never charged me anything, sir, but I usually gave him a little money.

Q. How much would you give him?

A. Two two to five dollars.

Q. Do you recall how much you gave him all told for your reservations?

A. I can't recall the exact amount.

Q. Would you say twenty dollars or more than that?

A. Twenty dollars I know, and more I guess.

Q. Was this part of the money that you received from your guests for getting reservations for them?

A. Yes, sir.

Q. Do you recall obtaining a ticket for Mr. Rosenblatt?

A. Yes.

Q. Tell us how you got that reservation?

A. Gentlemen of the jury, Judge, your Honor and with due respect to the Court: On the date of March 3, 1944, between the hours of nine and ten I came down to the Florida East Coast depot, I walked up to the colored ticket window and stood there for a while, and up comes a man that I didn't know at the time, but I later learned his name was Mr. O'Rourke. He asked me what did I want, and I said I would like to obtain sleeping accommodations for two. He said, "I haven't anything now, but if you will wait fifteen minutes or so I will see if I can find something for you." I then went away and came up to the telephone and called the reservation room myself. I was unable to get anything, so I turned back to the window, and he said to me, "All I have is an upper to Washington." I said, "I will take that". Then he asked me if I had a ticket, and I said that I didn't. So he made the ticket up and he presented it to me and he reached for the money. I asked him how much it was, and he said $136.24. I then gave him $136.24. He gave me the ticket and I turned away and then looked at the ticket and it was marked $116.24. So then I thought I had overpaid twenty dollars, but I turned away, and that was all. I went back to my hotel and try to get Mr. Rosenblatt, but he wasn't there; so I presented the ticket to the night clerk, telling him to give Mr. Rosenblatt the tickets because he must leave early in the morning. Finally that morning when I arrived I found an envelope had been left for me with $116.24.

Q. By Mr. Rosenblatt?

A. I don't know who left it at that time, because I was just on the job and I didn't ask any questions.

Q. That reimbursed you for the tickets?

A. That is right. So as I walked in the hotel a gentleman, an FBI man, spoke to me. He said, "Are you Zack",

and I told him I was. Then he said, "I want you to turn over those tickets and everything that you have, and we want to check upon you." So I took a ticket out of my pocket and presented it to him. He said, "You bought this ticket last night", and I said yes. He then asked me how much did I pay for it—

Q. Never mind going into the conversation that you had with the FBI man?

A. All right; that's all, sir.

Q. Did O'Rourke ask you for any money over and above this $116.24?

A. Twenty dollars.

Q. He asked you for twenty dollars?

A. Yes, sir.

Q. Did you get that twenty dollars back from Mr. Rosenblatt?

A. No, sir.

Q. So you were out twenty dollars?

A. Yes, sir.

Q. When did it become difficult in your position to obtain ticket reservations for your guests?

A. Soon after Christmas.

Q. Did you have any trouble before the Christmas holidays getting tickets?

A. Not much.

Q. Did you have to pay anything for them over and above the price?

A. No, sir.

Q. Did you have to pay for reservations after Christmas in order to get them?

A. Well, as I got them along I gave a little money, because I figured that was the only way I could get them.

Q. How did you figure that was the only way?

A. Because I usually ran down and couldn't get any.

Q. Were the other boys getting tickets?

A. I guess they was.

Q. Did you have any trouble getting them after you left money with them?

A. Sometimes.

Q. But not as much?

A. No, sir.

Q. Do you recall having paid money for ticket reservations gotten through Mr. Dewhurst?

A. Yes, sir.

Q. Will you try to recall how much as a total you gave Mr. Dewhurst for getting ticket reservations for you, just as close as you can come to it?

A. I can't recall just how much because I didn't exactly keep a book.

Q. I understand that, but can you estimate it? Would you say it was a hundred dollars or more.

A. I couldn't say it was more than a hundred dollars.

Q. You couldn't say it was?

A. No, sir.

Q. You say that this man that you talked to at the station, the FBI man who contacted you at the station—

A. I didn't know him at the time.

Q. When did you find out who he was?

A. On March 4th, after the officer took me in a room and tried to identify which man it was that sold me the ticket. I described the man to him that day and he took me in a room and asked me to identify which man sold me the ticket, sir.

Q. Did you identify him?

A. Yes.

Q. Is he in the courtroom now?

A. Yes, sir.

Q. Which one is he?

A. That man right there.

Q. The one sitting on the corner?

A. Yes, sir.

Mr. Duhaime:

Your witness, Mr. Riley.

Cross Examination.

By Mr. Riley:

Q. As Superintendent of Service in getting tickets for the guests at the Hotel Gaylord, you generally received tips from those guests when you procured tickets for them, did you not?

A. That is right, sir.

Q. Rosenblatt didn't give you a dime as a tip?

A. I didn't see him at all.

Q. You went to the trouble of getting space for Rosenblatt and he didn't reward you for it in any way?

A. I didn't see him; it was late at night and he was out.

Q. Very few of these guests failed to tip you?

A. That is correct. If you lose on one you will gain on another.

Mr. Riley:

That is all.

(Witness excused.)

230 Thereupon: EDWIN B. POORMAN, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. Edwin B. Poorman.

Q. You are a Special Agent of the FBI?

A. Yes.

Q. Were you connected with the Miami office of the Federal Bureau of Investigation during the months of December, 1943, and January, February and March of 1944?

A. Yes.

Q. Were you during those months doing surveillance work in connection with this matter?

A. I was during the latter part of February and the first part of March, 1944.

Q. Will you state what you observed with reference to the subject defendant Dewhurst?

A. I was in and around the Florida East Coast station for several days, and on the 25th of February, on Friday, I had occasion to be in the station some ten hours or so. During that time I saw the previous witness, Zack Johnson, come to the colored window at the station on four separate occasions. At about nine o'clock on the night of February 25th, about five minutes after nine, I saw Zack Johnson in his Superintendent of Service uniform at the colored ticket window where Mr. Dewhurst was stationed. I observed this from across the waiting room, looking from the rear, and I saw Zack Johnson complete a transaction apparently for tickets with Mr. Dewhurst, and hand several greenback bills to Mr. Dewhurst. During the same transaction Mr. Dewhurst gave Zack Johnson tickets or reservations in an envelope. I watched Mr. Dewhurst take the money from Zack Johnson and apparently count it, and then he took one or more of those bills and put it in his left pants pocket. Zack Johnson remained at the window a few minutes talking, and then Mr. Dewhurst took the money out of his pocket again, taking apparently more money from his hip pocket and put the two groups of bills together and then put it back in his hip pocket. About twenty minutes later, around 9:25 or 9:30 P. M.

that night, I saw a colored bellboy, later identified as Van Buren Morris, come to the colored ticket window and talk to Mr. Dewhurst. I saw Morris hand Mr. Dewhurst money and tickets apparently passed between them, and I again saw Mr. Dewhurst take some of these greenback bills and put them in his pocket.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. In regard to the Zack Johnson transaction, which I believe you said occurred on February 25th, did Zack Johnson pay for his ticket and then after getting the ticket hand some extra greenbacks to Dewhurst?

A. No, sir; it is my recollection that he handed the money to him all at one time.

Q. And then he got some tickets?

A. Yes, sir.

Q. You saw him and Dewhurst talking together but you could not hear what they said?

A. No, I couldn't hear what they said to each other.

Mr. Riley:

That is all.

Mr. Duhaime:

You may come down.

(Witness excused.)

234 Thereupon: JOHN F. LOOME, a witness on behalf of the government, resumed the stand and was examined and testified further as follows:

Direct Examination.

By Mr. Duhaime:

Q. You have previously testified in this case?

A. I have.

Q. Were you on surveillance at the Florida East Coast depot during the month of February, 1944?

A. I was.

Q. Do you recall an incident wherein Zack Johnson was concerned?

A. I do.

Q. Tell the jury about that?

A. I was standing on the track side on February 25th, the evening of February 25th—on the track side of the Florida East Coast depot; I was looking into the ticket office, into the interior of the ticket office, when I noticed that somebody had appeared at the colored ticket window and that a transaction was in progress there. It took approximately twenty minutes for the business in progress to be handled, and during the course of the progress of the business I went around through the colored waiting room to see who was at the window, and I noticed that Zack Johnson was there. I then came back to complete my observation of what was going on from the ticket seller's side. I was approximately twelve feet from the ticket seller at the time, and I noticed that they had quite a bit of conversation, and that some money was passed from the person on the outside of the window through the window, which was counted by the ticket seller, Mr. Dewhurst. He put some of it into the drawer and took some off and put it in his side pocket. First he prepared some tickets and put them in envelopes, and while they were still on the counter and before he pushed them across to the patron on the outside, he took the money out of his side pocket. First he removed some from his rear pocket and then he took the money out of his side pocket, straightened up the bills and put them on his roll and then put the roll back into his back pocket. He continued to talk to the person on the outside of the window and finally shoved some envelopes through to him. The person left the window, and I went around to see who that person was, and I noticed again that it was Zack Johnson.

Q. Did you ever see any other transaction with reference to the passing of money, with respect to the defendant Dewhurst?

A. No, sir.

Q. Is that all?

A. Yes, sir.

Mr. Duhaime:

Take the witness.

Cross Examination.

By Mr. Riley:

Q. In other words, from what you noticed Dewhurst put the money for the ticket into the Florida East Coast ticket drawer, and any excess he kept for himself; is that the idea?

A. Yes, sir.

Mr. Riley:

That is all.

237 Thereupon: EULA S. OHLER, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. Eula S. Ohler.

Q. And your address, please?

A. 2190 N. W. Fifth Avenue, Miami, Florida.

Q. During the early part of 1944 where were you employed?

A. Ticket seller at the Florida East Coast.

Q. Are you employed there now?

A. No.

Q. Do you know the defendant Terence P. O'Rourke?

A. Yes.

Q. Did you during that period of time have any conversations with him about tickets or Pullman reservations?

A. Just ordinary conversation—nothing particular.

Q. Tell us what that conversation was?

A. The only thing that Mr. O'Rourke ever said to me was that a coach seat was worth five dollars of anybody's money.

Q. Did he say any particular coach seat or just coach seats?

A. No.

Cross Examination.

By Mr. Riley:

Q. What was your job?

A. Ticket seller.

Q. Did you ever get any tips from the general traveling public for anything you did for them?

A. I did.

Q. If you got them space they would give you a tip?

A. I have given space and I have gotten a tip, yes.

Mr. Riley:

That is all.

(Witness excused.)

239 Thereupon: WILLIAM G. BALZ, a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. William G. Balz.

Q. What is your address, Mr. Balz?

A. 2330 Midvale Terrace, Kalamazoo, Michigan.

Q. What business are you in?

A. Manufacture of fishing tackle.

Q. Have you been subpoenaed here to testify in behalf of the government?

A. Yes.

Q. Were you here in Miami during the winter season last year?

A. I was.

Q. Did you have any difficulty in obtaining reservations to return to Kalamazoo?

A. I did.

Q. Tell us what difficulties you ran into and just what you did.

A. We arrived here approximately February 1, 1944. Mrs. Balz and myself, and the very next day we went down to the Florida East Coast railway station and stood in line for three hours in an effort to obtain reservations back, due to the fact that we had heard that it would take thirty days to get return reservations. After we got up to the window the ticket agent there said it was impossible to get any tickets and that we might as well forget about it, but that if I wanted to I could call Miss White and see what she could do for us. Then we left there and went back to the hotel and talked to the Superintendent of

Transportation there, asking him to get us reservations back home. He said he would see what he could do, that it would probably cost us much money, and I told him to go ahead and get the reservations regardless of the cost involved. We waited and waited, but we never get any reservations; so I went to this man again and told him that I simply must get back, that our company was operating 100% on defense work and—

The Court:

Don't go into your reasons for wanting to get back.

A. Well, I asked him to kindly proceed to get the tickets. I gave him ten dollars, I believe, at that time, and told him to see what he could do. I still didn't hear anything. So about February 26th or 27th I really had to make arrangements and I told him again to please get the tickets and that I would pay anything that was necessary to obtain the tickets. He again said that he would see what he could do. About a day or two later he told me he thought he could get them, but that it would cost me forty dollars if I wanted them, and I told him that I would take them. I believe it was the night before we left that I got the tickets. He told me how much they were, and I paid him forty dollars besides the railroad charge.

Q. What hotel did you stop at?

A. This transaction took place at the Broadmoor Hotel in Miami Beach.

Q. Do you recall the number of the room you occupied?

A. I think it was 512 or something like that.

Q. Do you recall the name of the Superintendent of Service that you gave the money to?

A. I don't.

Q. Was it Failing?

A. I don't remember the name.

Mr. Riley:
Do you have him here?

Mr. Duhaime:
No; we couldn't find him.

Q. Is this your handwriting?
A. No, it is not.
Q. Would it be room 504?
A. That sounds like it.
Q. You can't recall the name of the man that was the Superintendent of Service?
A. No, sir. I do recall that he was injured in one hand.
Q. White or colored?
A. White.

Mr. Duhaime:
That is all.

Cross Examination.

By Mr. Riley:
Q. You knew, did you not, when you gave this superintendent of service forty dollars that you were violating the law?

Mr. Duhaime:
I object to that—

The Court:
Before we get into that, are you going to connect this up with this witness—rather, with these defendants?

Mr. Duhaime:
Yes, sir.

The Court:
It ought to be connected up, otherwise it is not competent.

Mr. Riley:
If it is not connected up, I am going to move to strike it.

The Court:
Read the question.

(Preceding question read by the Reporter as above recorded.)

The Court:
Objection sustained.

Q. I am going to ask the question in another way. Did you know that you were violating the law when you gave the superintendent of service forty dollars?

Mr. Duhaime:
I object to that on the same grounds.

The Court:
Sustained.

Q. Was the forty dollars given to the superintendent of service as a tip or gratuity for service he was to perform for you?

A. Well, normally one wouldn't pay tips of that size. He definitely stated that it would cost money, that he would have to split with somebody. I wasn't interested in who he had to split with. The only thing I was interested in was to get the transportation.

Q. Do you have to follow that same course any place up north when you get tickets?

A. I didn't.

Q. You are down here enjoying our winter sunshine at the expense of the government now?

A. Partially, I would say, at the expense of the government.

Re-Direct Examination.

By Mr. Duhaime:

Q. Have you been here other seasons?

A. Yes, sir.

Q. Did you ever have to pay for reservations at other seasons?

A. I never have.

Mr. Duhaime:

That is all.

(Witness excused.)

244 Thereupon: RALPH W. MILLS, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. Ralph W. Mills.

Q. Are you a Special Agent of the Federal Bureau of Investigation?

A. I am.

Q. During the early part of 1944 were you stationed at Miami, Florida?

A. Yes.

Q. Were you on surveillance or connected in any way with these railroad ticket cases?

A. I was.

Q. Do you know the defendant Terence P. O'Rourke?

A. Yes.

Q. When was the first time you made his acquaintance?

A. Well, I knew who he was for a period of time before I actually met him. I first met him on March 4, 1944.

Q. What was that occasion?

A. That was after we had conducted considerable investigation into this matter, and we decided that we would like to talk to Mr. O'Rourke regarding these alleged black market operations—

Mr. Riley:

If your Honor please, I wish to move to strike the statement by this witness of black market operations because it is a prejudicial statement and it is an unfair statement, and the operations testified to here do not constitute black market operations.

Mr. Duhaime:

We have no objection to striking out the words "black market operations".

The Court:

The motion is granted. Gentlemen of the jury, you will disregard the designation of what the operations were by the witness.

Q. When you talked to Mr. O'Rourke did you find anything or take anything that was in his possession on that day?

Mr. Riley:

Now, if your Honor please, the records of the United States Commissioner will show that warrants were issued

on March 3, 1944, and that these defendants were not taken into custody by virtue of those warrants, but that they were brought down to the FBI office on March 4th without service of a warrant upon them and without notification to them that the FBI had a warrant for them; therefore, unless the proper predicate is laid for this testimony it is improper and illegal.

The Court:
Let the jury retire.

(Jury retires from courtroom.)

The Court:
When certain preliminary matters in the way of motions came up before this Court, counsel for the government stated that there was to be no intention to question the agents in regard to conversations with the defendants, which was the subject matter of the plea in bar. The Court has no objection to trying this case just as counsel may present it and the Court will rule on matters as they are presented, but I can see (and I merely call it to your attention) no difference in taking something and the defendant making a statement. You asked Mr. Mills, the witness, whether he took something from Mr. O'Rourke. Now, if the government wants to go into all of those matters, we will do so, and the Court will deal with them and make rulings at the time.

Mr. Duhaime:
I will withdraw that question. Perhaps I should not have used the word "take". Before recalling the jury I would like to proffer this testimony:

The Court:
All right.

Q. Did Mr. O'Rourke give or offer to you any papers at that time?

A. Yes, he did.

Q. Did you ask for them or did he voluntarily give them to you?

A. I asked for them in this manner: I asked him if he had any papers in connection with his work with him, and would he object to letting us see them. He said that he would and would be very glad to help us clear up any questions we wanted to ask, and with that preface he more or less let us see the contents of his pockets.

The Court:

There is no difference. It all goes to the voluntary character. If you want to go into that, we will do so. That would be a departure from what was asserted in the argument on the motion. If you intend to go into that, we will do so. If that is your purpose, we will go into the matter of their voluntary character and so on. The plea in bar is out of the case; it has been stricken, and I am only recalling to your attention certain statements made at that time. As I see it, this sought to be elicited testimony as to the voluntary or involuntary character of any papers from one of the defendants at that time would open up the whole matter.

Mr. Duhaime:

May it please the Court, we take an exception to the ruling of the Court on the ground that we said we were not going into the question of confessions. The question propounded to Mr. Mills would have nothing to do with confessions; but, adhering to your Honor's ruling, we will withdraw the witness from the stand and not question him any further.

Mr. Riley:

I want the record to show this, as it probably does if the Reporter took down your remarks, that the Court is not preventing the government from showing legally that a paper was taken legally or given by O'Rourke to this agent, and that the government is not deprived of its right to establish a predicate for the admission of that paper that they took, and that you are only cautioning the government that at the time the plea in bar was argued by Mr. Duhaime and Mr. Dressler, the government made some statement that it would not introduce any confessions, but you are not preventing the government from introducing evidence now that the government lays the proper predicate for.

Mr. Duhaime:

The government merely withdraws the witness, your Honor.

The Court:

I think the remarks of Mr. Riley are pertinent. I am advising government counsel, having in mind what took place on the argument of the motion to strike the plea in bar, that the obtaining of any paper from a defendant at the time involved in the interrogation, which was the subject matter of the plea in bar, is of the same category as a confession or written statement, be it called a confession or whatnot, and I am advising counsel for the government that in my judgment (and I make this ruling) the question propounded to the witness with reference to the obtaining, voluntarily or not, of a paper or document or anything tangible from one of the defendants at that time and place, is of the same category as the matter of obtaining a written statement, and therefore the Court, having advised counsel and giving counsel for the government the

benefit of that advice, I agree with Mr. Riley and am not depriving the government of the right to go into the matter during the trial of this case.

Let the jury come in.

(Jury returns to jury box.)

Mr. Duhaime:

You may come down, Mr. Mills.

The Court:

Gentlemen of the jury, prior to your leaving the courtroom an objection was made to a question. That objection is sustained.

249 Thereupon, MIKE TOSE, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Duhaime:

Q. What is your name?

A. Mike Tose.

Q. What is your address?

A. Bridgeport, Pennsylvania.

Q. Were you subpoenaed to testify here in this case?

A. Yes, sir.

Q. Do you know Joel Weiss of Westchester, Pennsylvania?

A. Yes, sir.

Q. Do you know Terry O'Rourke?

A. I met him.

Q. Were you in Miami during the winter season of 1944?

A. Yes, sir.

Q. Where did you stay while here last winter?

A. Kenmae Apartments.

Q. Do you know where Mr. Weiss was staying at that time?

A. In a hotel somewhere on the Beach; I have forgotten the name of it.

Q. Will you tell the Court, when you first met Mr. Terence O'Rourke?

A. I met him sometime in February.

Q. Of last winter?

A. Yes.

Q. Where did you meet him?

A. At the station, at the railroad station.

Q. Florida East Coast station?

A. Yes, sir.

Q. What was the reason for that meeting?

A. We got a ticket for Mr. Weiss.

Q. From Mr. O'Rourke?

A. Yes, sir.

Q. Tell us about getting the ticket and what you had to do to get it?

A. Well, we gave him ten dollars for the ticket.

Q. Who gave him ten dollars for the ticket?

A. Mr. Gottlieb gave him ten dollars.

Q. Were you there at the time?

A. Yes, sir.

Q. Did you see Mr. Gottlieb give Mr. O'Rourke the money, the ten dollars?

A. Yes.

Q. Was Mr. Weiss there?

A. No.

Q. Who did Mr. O'Rourke give the ticket to?

A. To Mr. Weiss, I believe.

Q. He didn't give it to him at that time?

A. No, he didn't give him anything at that time; we just gave him the ten dollars to get the ticket.

Q. Was Mr. Weiss a friend of yours?

A. Yes, sir.

Q. Were you introduced to Mr. O'Rourke?

A. Yes, sir.

Q. Who introduced you to Mr. O'Rourke?

A. Mr. Gottlieb.

Q. Now was this done at the ticket window in the normal transaction of business?

A. No, sir; gave him an envelope on the outside of the ticket office.

Q. Tell us how that happened, please.

A. He came out and was going away and I told Mr. Gottlieb he might as well give him the ten dollars now because we didn't want to have to come back, so we put the ten dollars in an envelope and he gave it to him.

Q. He gave him the ten dollars. Was that your money?

A. It was my money.

Q. Had you talked to Mr. Weiss about getting the ticket?

A. Yes, sir.

Q. Had Mr. Weiss instructed you to pay Mr. O'Rourke anything for the reservation?

A. I told Mr. Weiss that we would have to pay something to get the ticket or reservation, and he said it was all right and to go ahead and try to get it.

Q. Dr. Mr. Weiss reimburse you for the ticket?

A. Yes.

Q. Did you go to the station later on with Mr. Weiss?

A. Yes, sir.

Q. What took place at that time?

A. Mr. Weiss went over Friday to get the ticket and he didn't get it because Mr. O'Rourke told him he didn't know him, so Mr. Gottlieb went along to identify him.

Q. What took place when you identified him to O'Rourke?

A. Mr. Weiss didn't get the ticket that day; I think he told him to come back the next day. I didn't go back with him the next day.

Q. You didn't go back with him the next day?

A. No, sir.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. In the course of your conversation with Mr. O'Rourke did he tell you that he had cancellations—

A. He was talking to Mr. Gottlieb; I didn't hear anything.

Q. He talked to Mr. Gottlieb, but you are the one who gave him the ten dollars?

A. Yes, sir.

Q. And about how long after that was it before Weiss got his ticket—two or three weeks?

A. It was only a couple days later.

Q. When did Weiss leave?

A. I think he left on Sunday morning.

Q. Was that the same day he got the ticket?

A. I think he got the ticket on Saturday and left here on Sunday morning.

Mr. Riley:

That is all.

(Witness excused.)

Thereupon JOEL WEISS, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

254 Direct Examination:

By Mr. Duhaime:

Q. Your nam is Mr. Joel Weiss?

A. Yes.

Q. Where is your home?

A. West Chester, Pennsylvania.

Q. What business are you in?

A. I am a retail merchant.

Q. Were you subpoenaed here to testify in behalf of the government?

A. Yes, sir.

Q. During the winter season of 1944 were you in Miami?

A. Yes.

Q. Have you been here other winter seasons?

A. No, sir; I hadn't been here for about eight years.

Q. How long were you at Miami Beach last year?

A. About three weeks.

Q. Do you recall when you arrived here?

A. I think about the 12th.

Q. Of what month?

A. February, 1944.

Q. Did you come alone?

A. No; with Mrs. Weiss.

Q. Did you have any difficulty in obtaining reservations to return?

A. I did.

Q. Will you tell the jury what you ran into?

A. A few days after being in Miami Beach I heard rumors that it was difficult to get—

Mr. Riley:
I object to him stating rumors.

The Court:
Sustained.

A. Well, after a few days I tried to get reservations to return to my home town, and after trying several places, even calling up the Secretary of the Chamber of Commerce, I found it very difficult. A couple days later I had a conversation with Mr. Tose at the hotel and in the course of our conversation I told him of my trouble. He said I should not worry, that he knew a friend who knows a friend that would secure a ticket for me, so I depended on him to get the reservations. A few days later he called me and told me to get and see Terry O'Rourke at the Miami station. On my way down to the station I stopped off at his home to get the directions correctly, and then it was that he told me that he had laid out ten dollars and asked me to reimburse him for the accommodations, which I did. I then proceeded on to the station and I went to Terry O'Rourke's window to inquire about my reservation, and he said, "I have no reservation; I don't know Joel Weiss, I don't know Mr. Tose and I don't know Mr. Arnold; I have no reservations for you, and my name is Terry O'Rourke." Well, I went away very much discouraged and went back to Mr. Tose, and at that time we all went down to a telephone and called Terry O'Rourke, and the course of the conversation was supposed to—

Q. Don't suppose.

A. After the telephone conversation they told me that Terry O'Rourke would see me that night. So I went down to the station that night and Terry O'Rourke emerged from his door and said, "I am sweating blood; I cannot get the ticket but you wait." I waited and waited, and he came out several times, still "sweating blood". Then

finally he came out and said that he had a lower berth for Mrs. Weiss. That was very discouraging and I refused it. He said then that he would have a compartment for the following day, which sounded very satisfactory, so I said I would wait. The following night I came down around ten or ten-thirty and Terry O'Rourke was still sweating blood. Finally he came out about twelve o'clock and said, "I have a ticket for a lower berth." Well, in disgust I took the ticket and handed him fifteen dollars and said keep the change. The following morning we boarded the train, and when I got into my car, number 72, there were four other people occupying the same berth. I left the car and went out and talked with the conductor and he told me to get on the train and he would unscramble it later on, because he had several other instances of the same kind.

Q. Were you straightened out enroute as to your accommodations?

A. Yes. We traveled about two or three hours, and the conductor came to me and said they had telephoned and that they were going to put on another car, at which time I received an upper berth, which we paid for.

Q. You had already paid Mr. Tose ten dollars for your accommodations?

A. Yes, sir.

Q. And you also gave O'Rourke the change from the fifteen dollars?

A. Yes, sir.

Q. Did you consider this money that you paid for this ticket a tip?

A. I was really so tired and disgusted that I didn't want to wait; I wanted to get away.

Q. I mean the ten dollars.

A. Oh, the ten dollars?

Q. Yes.

A. Well, it was a necessity for me to get back, and that was the only way for me to get the ticket.

Q. Do you recall the car and berth number that you had?

A. Car 72, berth 6.

Q. Do you recall the date?

A. We left on Sunday, the 27th. I secured my ticket on the evening of the 26th.

Mr. Duhaime:

Your witness.

Cross Examination.

By Mr. Riley:

Q. What was the cost of lower berth six in car 72?

A. Ten dollars and change; I don't remember the exact amount, but I know it was over ten dollars.

Q. Over ten and under eleven?

A. Right.

Q. You just told O'Rourke, when you handed him the fifteen dollars, to keep the change?

A. That is right.

Mr. Riley:

That is all.

(Witness excused.)

Mr. Duhaime:

Mark this for identification.

(Instrument marked Government's Exhibit 7 for identification.)

Thereupon: JOHN P. SMART, a witness on behalf of the government, was recalled and testified further as follows:

259 Direct Examination.

By Mr. Duhaime:

Q. Mr. Smart, I hand you herewith government's Exhibit 7 for identification, and will ask you to identify this exhibit for us.

A. This is Form 11 diagram, and it consists of eight sections, one drawing room and three double bedrooms, Car 72, Miami to Washington, Train Number 8, February 27, 1944.

Q. What ticket number is berth six in that car 72?

A. 2732.

Mr. Duhaime:

I offer this in evidence.

Mr. Riley:

Just a moment.

Cross Examination.

By Mr. Riley:

Q. You have been in the Courtroom while all of these witnesses testified, have you not?

A. That is right.

Q. You heard Mr. Weiss testify that there were four people in lower berth six, meaning four people were sitting in chairs, I suppose. Now does this card in any way indicate why that same space was sold to three or four people?

A. It could have worked this way: we in the diagram room could have made a mistake and gave berth six for

the 28th—or for the 27th when it should have been made for the 28th, or one for the 25th could have been marked down for the 27th; it might have been that we gave the space all for the 27th to the ticket sellers.

Mr. Riley:
No objection.

The Court:
Admitted.

(Said document was admitted in evidence as plaintiff's Exhibit 7.)

Thereupon: LAIRD K. SMITH, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

260 Direct Examination.

By Mr. Duhaime:
Q. Please state your name.
A. Laird K. Smith.
Q. Are you a Special Agent of the Federal Bureau of Investigation?
A. Yes, sir.
Q. Were you stationed in Miami druing the early spring or the first several months of 1944?
A. I was.
Q. Did you work on this case?
A. I did.

Mr. Duhaime:
Mr. Clerk, please mark this for identification.

(Instrument marked government's Exhibit 8 for identification.)

Q. I will ask you this question: Did you endeavor to obtain from Mr. and Mrs. Weiss their railroad stubs?

A. No, I didn't make any attempt to obtain them from them.

Q. Did you endeavor to make a check of the railroad department for their ticket stubs?

A. Yes, sir.

Q. I hand you government's exhibit number 8 for identification and will ask you to explain where you got that exhibit?

A. I obtained it from the office of the Florida East Coast Railroad, from their official, Mr. Jeffries, in the Ingraham Building.

Mr. Riley:
I have no objection to it going in evidence.

Mr. Duhaime:
Then I offer it in evidence.

The Court:
Admitted.

(Said stub was admitted in evidence and marked Plaintiff's Exhibit Number 8.)

Mr. Duhaime:
That is all.

The Court:
Call your next witness.

Thereupon: W. M. WHARTON, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

262 Direct Examination.

By Mr. Duhaime:

Q. Please state your name.

A. W. M. Wharton.

Q. What is your position with the Florida East Coast?

A. I am not with the Florida East Coast.

Q. Do you work for a railroad company?

A. I am with the Atlantic Coast Line.

Q. What is your position with the Atlantic Coast Line?

A. Assistant General Passenger Agent, at Jacksonville.

Q. Do you recall an incident on or about February 27th, 1944, with reference to the Florida East Coast train 8, the Champion, putting on an extra car?

A. We put an extra car on train 8, Florida East Coast Champion, at Jacksonville, to take care of duplicate sales.

Q. How did you find out about it?

A. According to our records, the Pullman Company in Jacksonville received advice from their conductor that they had certain duplicate reservations for space which they couldn't protect. The Pullman Company conferred with the Atlantic Coast Line Passenger Department and they ascertained that they had a car in Jacksonville which they could use to protect the passengers on this train who had duplicate sales—

Q. Was an extra car placed on at Jacksonville?

A. An additional car was placed in the train at Jacksonville to accommodate those who had duplicate seats or space. I don't know who they were. It was just a question of protecting and providing accommodations for those holding duplicate space.

Mr. Duhaime:
Thank you. Your witness.

Mr. Riley:
No questions.

(Witness excused.)

Thereupon: J. K. BREAUX, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

264 Direct Examination.

By Mr. Duhaime:

Q. Your name is—

A. J. K. Breaux.

Q. What is your position with the railroad company?

A. I am connected with the Pullman Company in the capacity of District Superintendent at Jacksonville, Florida.

Q. Do you recall an incident on or about February 27th, 1944, with reference to an extra Pullman car on the Champion?

A. Yes, sir.

Q. Tell the Court about that, please.

A. My car distributor received a wire requesting relief for a number of duplicate sales on that particular train. Accordingly we communicated with the Railroad Company, which is the usual procedure, and they authorized operation of an extra car from Jacksonville to New York, Champion, number 8, on February 27, 1944.

Q. Was that an unusual incident?

A. Yes.

Q. It had not happened before.

A. No. It is only done in exceptional cases. There were outstanding a number of duplicate sales that day and we could protect them with this car.

Mr. Duhaime:
That is all.

Cross Examination.

By Mr. Riley:
Q. May I ask you whether or not on March 1, 1944, due to travel conditions, an extra train was put on to carry passengers from Miami, Florida, to northern points?
A. I couldn't answer that. I have no mental record of it.

Mr. Riley:
No further questions.

Mr. Duhaime:
Thank you. You may come down.

(Witness excused.)

Thereupon: ELDON M. PENN, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

265 Direct Examination.

By Mr. Duhaime:
Q. Your name is—
A. Eldon M. Penn.
Q. Are you a Special Agent of the FBI?
A. Yes.
Q. Were you stationed in Miami at the Miami office during the early months of 1944?
A. Yes.

Q. Do you know the defendants Howitt and Lee?

A. I do.

Q. Were you surveillance in reference to the subject matter of this case now being tried?

A. I was on March 2nd, 1944.

Q. Tell us what you observed.

A. On March 2, 1944, a little after two P. M., Mr. Howitt left the Florida East Coast ticket office and proceeded in his car to a filling station at the corner of Northwest First Court and First Street in the city of Miami. Shortly thereafter he was met by Miss Lee. They proceeded to the Washington Drugstore on Miami Beach and had their lunch, and at that place they were met by Mr. Jack Goldberg, a bell captain at the Nemo Hotel on Miami Beach. During the conversation it was observed that Mr. Goldberg handed some papers to Mr. Howitt. They stayed at the drugstore approximately 45 minutes and proceeded then to the Roney Plaza Hotel, where they engaged in a conversation with a Mr. Stewart at the transportation desk of that hotel. They stayed at this hotel approximately an hour, and then proceeded to the Wofford Hotel drugstore, and from there to the Triton Hotel, where they stayed until about five-thirty.

Q. Did that end your surveillance with reference to these defendants?

A. Yes. They returned to Miami proper after they left the Triton Hotel.

Mr. Duhaime:

You may examine.

Mr. Riley:

No questions.

(Witness excused.)

268 STIPULATION.

Mr. Duhaime:

It is stipulated and agreed by and between counsel for the respective parties, that if HARIETT MERSON, 617 St. Paul Street, Baltimore, Maryland, were present she would testify as follows:

That government exhibit 4 for identification is her part of ticket stub which she received for traveling in lower berth 6 in car F-73 on the Champion, departing from Miami, Florida, at 8:15 A. M. on the 10th day of February, 1944, represented by Pullman stubs 1454 and 2601.

That she requested Elliott to obtain reservations for her from Miami to Baltimore on the morning of February 9, 1944; that he advised her that he thought he could obtain these reservations for her, but that it would cost her ten dollars over and above the regular fare. That she gave Elliott $75 and he returned to her two dollars in change. That she later checked on the ticket fare and discovered that he had actually charged her $18 more than the regular fare; that she questioned Elliott regarding this and he told her that he had by mistake told her the wrong figure—that he had charged her for a one-way Pullman fare from Miami to New York because he thought New York was her correct destination; that he thereupon immediately returned $8 to her and stated that the reservation would be obtained.

That on the morning of February 9, 1944, at approximately 6:00 A. M. her husband was at the Atlantic Coast Line Railroad Depot when bellhop Elliott approached him and told him that, he, Elliott, was at that time arranging for her Pullman reservations north. That her husband thereupon requested that he endeavor to obtain two reservations so that they could travel north together; that Elliott stated that he could arrange this and thereupon contacted a man at the Atlantic Coast Line ticket window.

That after contacting this man Elliott advised her husband that the necessary arrangements had been made and that her husband could pick up the reservations on the morning of the 10th. That at that time her husband paid the ticket salesman $105 and some odd cents covering train fare, two Pullman reservations, one upper and one lower berth, to Washington, D. C., and two seats in a coach car from Washington to Baltimore. That later Elliott returned the rest of her money to her with the exception of the ten dollar fee which I had agreed to pay him for obtaining these reservations.

That on the following day her husband picked up the reservations at the ticket window at the Atlantic Coast Line depot; that said reservations were for upper and lower berths 6 on Car F 73, leaving Miami, Florida, at 8:15 A. M. on February 10, 1944, and that she and her husband used said space.

Mr. Riley:
That is agreeable.

Mr. Duhaime:
I now offer exhibit 4, the stub, in evidence.

Mr. Riley:
No objection.

The Court:
Admitted.

(Said stub was admitted in evidence and marked Plaintiff's Exhibit Number 4.)

Thereupon: W. A. RHODES, a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

270 Direct Examination.

By Mr. Duhaime:

Q. What is your name, please?

A. W. A. Rhodes.

Q. What is your capacity with the railroad company?

A. I am chief clerk in the Passenger Traffic Department of the Florida East Coast at Miami.

Q. Do you have the records of your office with reference to the fares charged by the railroad companies during the months of January, February and March, 1944?

A. Yes, sir.

Q. I will ask you if you will tell us the established rate of the Pullman Company for a lower berth from Miami, Florida to Washington, including the tickets, for sleeping car accommodations?

A. $10.56, including tickets, at that time.

Q. I will ask you if you will tell us what the established rate of the Pullman Company was for an upper berth from Miami to Washington, including ticket?

A. $8.03.

Q. I will ask you what was the established rate, joint through rate or fare on the railroad for a first-class passenger from Miami to New York, including tickets?

A. $50.09.

Q. I will now ask you what was the established rate for a drawing room from Miami, Florida to Chicago, including tickets—drawing room accommodations for two people?

A. $45.76.

Q. Now I will ask you what the established through rates were for transportation of passengers in reserve

coach seats from Miami, Florida to New York City, for two people?

A. $32.64 each, or a total of $65.28 for two people.

Q. What was the price of reserve seats from Washington to Baltimore for two people, including the tickets?

A. That information I do not have. Those tariffs are not in this office.

Q. Do you have your record of what woud be the established rate of two first class railroad tickets from Miami to New York?

A. $100.18 for two first class tickets to New York.

Mr. Duhaime:

Take the witness.

Cross Examination.

By Mr. Riley:

Q. A lower from Miami to New York costs $11.30 plus $1.13?

A. Correct.

Q. That would be $12.43?

A. Correct.

Q. If a purchaser gave a ticket agent $15 for such lower and told the ticket agent to keep the change, what would be the change?

A. $2.57.

Re-Direct Examination.

By Mr. Duhaime:

Q. And if he got ten dollars above that, how much would that be?

A. A total of $12.57.

Mr. Duhaime:

No further questions.

(Witness excused.)

Mr. Duhaime:

The government at this time would like to read into the record the following admissions that have been stipulated to. First, we will take the case of Stanley Howitt, Flora Post Lee and James F. Dewhurst:

"Come now the defendants and admit the first five paragraphs of the indictment and agree that it will not be necessary for the government to prove said five paragraphs, and that said five paragraphs may be read to the jury by the United States Attorney with the same force and effect as if evidence had been produced by the government to prove the allegations of each and every of said five paragraphs"—

The Court:

I think you will have to read them to the jury.

Mr. Duhaime:

All right. Gentlemen of the Jury, the first five paragraphs of the indictment in case No. 6399 are as follows:

(Paragraphs numbered 1, 2, 3, 4 and 5 of the Indictment in case No. 6399 read to the jury by Mr. Duhaime.)

Mr. Duhaime:

In case No. 6400 the same stipulation applies as to paragraphs 1, 2 and 3, and I now read to you said numbered paragraphs:

(Paragraphs numbered 1, 2 and 3 of the Indictment in case No. 6400 read to the jury by Mr. Duhaime.)

In case No. 6399 it is further stipulated and agreed:

"That the defendants waive the presence of the witnesses for the government hereinafter named, and agree

that if present they would testify in the manner hereinafter set forth and agree that the matter hereinafter set forth may be read to the jury by the United States Attorney in the same manner and with the same effect as if said witnesses were present in Court and had so testified; with this exception, that the defense will be permitted to interpose an objection that the matters and things so testified to by said named witnesses is immaterial and irrelevant. The names and the testimony so admitted are as follows:

274 "LILLIAN E. WEINER: I reside at 3318 Lake Shore Drive, Chicago, Illinois. During December of 1943 I stayed a few days at the La Salle Hotel, later moving to the Crest Hotel, Miami Beach, Florida. On January 19, 1944, I called the Florida East Coast Railroad Station and tried to make reservations on a coach train for Chicago for three. I was told there was nothing available and there would be a thirty day wait. The same day I went to the railroad station and talked to some man behind the ticket window and he told me the same thing. Later I talked with a young white boy at the Crest Hotel named Elliott, he was transportation captain. Elliott said if I wanted Pullman it would cost me $10.00, coach would cost me $5.00 per ticket. On January 21, 1944, Elliott advised me that he had three coach reservations two of them for January 22nd and the other for January 23rd, 1944. He delivered the reservations together with two railroad tickets on January 22nd and at that time I gave him $15 at the desk. My reservation was seat No. 20, Car DF 4 on train departing from Miami on January 23rd for Chicago. I do not remember what reservations my sister and daughter had on the previous day.

275 "MRS. ANNE ROSSUCK, 535 Cornelia Avenue, Chicago, Illinois. I am the sister of Lillian E. Weiner. I was aware of the fact that she had to pay $5.00 apiece for the reservations as I gave her $5.00 for mine. This money was over and above our railroad ticket fare.

"MRS. SARAH LUBAR, 3426 Douglas Boulevard, Chicago, Illinois. I was in Miami, Florida, in January, 1944, and lived at a guest house on Lincoln Street, Miami Beach, Florida. I wanted a coach reservation for New York but had heard it was impossible to get one in the station. I had been told that a boy at the Crest Hotel could get me one. I went to the Hotel a few days before January 19, 1944, and saw this boy. He said he could get me this reservation but it would cost me $5.00. A few days later at the hotel he gave me the reservation and I gave him the $5.00 in cash. The reservation was for a coach seat to New York on March 19, 1944, on a train departing about 6 or 6:30 P. M. I do not know the ticket number or seat number.

276 "MRS. GUSSIE LANDAU, 2474 Davidson Avenue, Bronx, New York. I left New York City on January 15, 1944, on the Champion for Miami, Florida, for my health. I had a reservation coach seat. I had a room at the Nemo Hotel, First Street and Collins Avenue. While there I became ill and had to leave earlier for New York than planned. I went to the bell hop at the hotel—whom I knew as Jack. He was about 5 feet 9 inches tall and in fact with a large stomach, seemed to be about 35 years old. I said, 'I heard you charge people to get train reservations for them.' He didn't answer me. I took out $5.00 and handed to him, along with my ticket, and he said he would take care of it. He brought me back a

ticket on the Champion, leaving Miami Monday morning, February 14, 1944. I occupied seat No. 29, Car CH 10, departing 7:30 A. M. March 14, 1944, from Miami, Florida to New York City, via Florida East Coast on ticket No. 3394."

Mr. Riley:
It is so stipulated.

Mr. Duhaime:
With reference to the O'Rourke case, No. 6400, the same stipulation applies:

277. "ISAAC REITENOUR, 431 North Walnut Street, Union City, Indiana. My housekeeper, Miss Louise Crawford, and I left Miami Beach on the Southwind at 5:15 P. M. on March 1, 1944, occupying seat numbers 16 and 20 in car 5. About thirty days prior to my departure I began trying to get seat reservations for my return trip. I met with no success until about February 25th or 26th, when I was standing in line at the second window from the north end at the Florida East Coast railroad station I saw a man ahead of me put two ten dollar bills in an envelope and give them to the ticket agent at this window. This agent accepted the envelope and said 'thanks' and placed the envelope under the ledge of his desk. When my turn came I told the agent that I had seen what was going on and that my money was as good as anyone else's. I then placed a ten dollar bill in an envelope and gave it to this ticket agent and told him I wanted a seat reservation to Indianapolis on March 1, 1944. He then said he would see what he could do and he immediately placed a telephone call, at the conclusion of which he stated to me, 'You are lucky; we have just had two cancellations', and for me to return the next

morning for the tickets. I do not know the ticket agent's name, but I would say he was 40 years of age, weight 165; height 5'10", slender build, black hair, rather heavy, dark complexion.

"I did not obtain these reservations, and later that day I was in the home of Mrs. Bee Skipton, who told me of a doctor from Indianapolis who had a reservation for March 13th and that he was not going to use it.

"I did not secure the reservations I made at the railroad station, nor did I try to get my ten dollars back.

"I have viewed a photograph of Terence P. O'Rourke and I believe him to be the ticket seller in question, but I cannot say that I am positive."

The Court:

Anything further?

Mr. Duhaime:

The government would also like to offer in evidence at this time an application for employment of one Peter J. Failing.

Mr. Riley:

Just state what it contains.

Mr. Duhaime:

It is an application of one Peter J. Failing for employment at the Broadmoor Hotel as Superintendent of Service. The address of the applicant is given as YMCA, Miami, Florida, and he gives for reference Terence P. O'Rourke, 108 N. W. 27th Street, Miami, Florida, Ticket Agent of the Florida East Coast Railroad Company.

278 STIPULATION.

It is stipulated and agreed by and between counsel for the respective parties that on October 18, 1943 the agreement or regulation in reference to the thirty-day waiting period became operative.

Mr. Duhaime:
The government rests.

The Court:
Mr. Riley, do you make any motion in regard to the Balz testimony?

Mr. Riley:
No, your Honor.

The Court:
We will take a recess to 1:30.

Miami, Florida,
January 31, 1945—1:30 PM.

Afternoon Session.

(In the absence of the Jury.)

Mr. Riley:
Now come the defendants Howitt, Lee, Dewhurst and O'Rourke, and respectfully ask that the Court direct the jury to return a verdict of not guilty on each and every count of the two indictments, for the following reasons, to-wit:

1. That the evidence shows that these defendants were not acting within the scope of their employment when the acts proven were committed;

2. That the evidence shows that neither the Florida East Coast Railroad Company nor any other railroad mentioned in the indictments, nor the Pullman Company, received any part of the money received by the agents over and above the lawful tariff rates;

3. That Section 1, Title 49, subsection 5, reads:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

That under said Interstate Commerce Act a prior determination must be made by the Interstate Commerce Commission as to whether an asserted discrimination and preference are lawful, and the Court is without jurisdiction to determine that question of preferences and unlawful discrimination until a finding is first made by the Interstate Commerce Commission.

4. That Section 6, paragraph 7, Title 49, page 283, U. S. C. A. says:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property".

A violation of that section applies to a common carrier or an officer or agent of such common carrier acting within the scope of his employment.

5. That there is no evidence to prove that under Sections 1, 2, 3 and 6 of Title 49 a change has been made in

the rates, fares and charges which have been filed by the railroad and published by the railroad as provided by law.

6. That Section 2 of Title 49 reads:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unalwful."

The defendants would not be guilty of a violation of that section unless and until it was proved that the common carrier had received the benefits or had violated the law, and that these defendants were acting within the scope of their employment.

7. That all discriminations are not forbidden under the Interstate Commerce Act, but only those discriminations against some person made for the advantage of the carrier.

I also wish to insert as a part of this motion, without repeating them, each and every ground set forth in the demurrers.

The Court:
The motion is denied.

Mr. Riley:
The defendants rest.

The Court:
Mr. Riley, do you want to make any statement in the presence of the jury about not putting on any evidence, or do you wish it to remain as it is?

Mr. Riley:
I think we might leave it as it is, your Honor.

The Court:
Very good. Let the jury come in.

(Jury returns to the Courtroom.)

On behalf of Government Mr. Duhaime argued the case.

The defense made no argument.

283 CHARGE.

THE COURT (Holland, J.):
Gentlemen of the Jury, you will be given, when you retire to consider of your verdicts, the two indictments. Both of these indictments were returned into this Court by the grand jury on the 12th day of April, 1944. The defendants were presented before the Court and, upon the contents of the indictments being made known to them, they entered their pleas of Not Guilty, and thus was presented issues of fact to be tried before a jury selected to try the cases.

The two cases have been consolidated and tried together. That is incident to good practice where the facts charged in the two cases are so related that time will be saved both of the Court and jury in allowing the two cases to

be consolidated and allowing the jury to hear the evidence that may be submitted as to both cases, and then allowing the jury to return separate verdicts as to each case, though tried as a consolidated action.

The indictments are not evidence against the defendants. The presentation of a charge of a violation of law by an indictment is a method by which an issue of fact may be created, and with that violation of law as charged in the indictment the defendants appear and enter their plea of Not Guilty, thereby establishing and creating an issue of fact which a jury has to try.

Case No. 6399 is the case in which Stanley Howitt, Flora Post Lee and James F. Dewhurst are the defendants. It is what in the law is called a conspiracy case. The federal law creates an unlawful partnership in crime as a seperate crime, and it is provided by the Congress of the United States that where two or more persons conspire or confederate among themselves with the purpose of violating some federal law, and where one or more of the conspirators does some act in order to carry out and effectuate the purpose of the conspiracy, then the members of that conspiracy are deemed guilty of violating that conspiracy section of the law. This indictment in case No. 6399 is based upon that federal law, and in this indictment you will find that it naturally divides itself into three separate divisions; first, you will find that there is a charge that these defendants did conspire, agree and confederate together. Incident to that first portion of the indictment you will find some introductory statements as a background. I shall read that more at length. Secondly, you will find, gentlemen of the jury, that there is a second division in that indictment in the conspiracy case, which sets forth what is the federal law which the indictment charges that the conspirators confederated together with the object of violating; and, thirdly, you will find that the last subdivision of that indictment embraces a delineation of factual matters which are set forth in the

indictment as constituting overt acts or factual matter which is charged by the grand jury as constituting acts done by one or more members of the conspiracy for the purpose of effectuating or carrying out the unlawful conspiracy.

I now take up and consider this indictment in case No. 6399. I shall not read to you the first five paragraphs. You will find them numbered. Paragraphs 1, 2 and 3 appear on the first page, and on the second page appear paragraphs 4 and 5. There was no controversy in this case between the government and defense counsel with reference to those first five paragraphs. There was no issue on them, and they were admitted. I shall commence with paragraph 6, which I shall now read:

"That at all times herein mentioned David Curry, Albert Lee Smith, Morris J. Goldberg, Albert D. Deverich and Elliott Elkin were superintendents of service at resort hotels on Miami Beach, Florida, and were active in endeavoring to secure coach seat reservations and Pullman reservations on passenger trains of said railroad companies departing from Miami for points outside of said State of Florida for the guests of said hotel.

"7. That heretofore, to-wit, commencing on the 15th day of December, A. D. 1943, and continuously thereafter up to and including the 4th day of March, 1944, the exact time being more particularly to the grand jurors unknown, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, said Stanley Howitt, Flora Post Lee and James F. Dewhurst, well knowing the premises aforesaid"—

Here now is the specific language which is the heart of the first subdivision to which I referred, and this is where it is charged that there was a combination, confederation and agreement among them. The words of the indictment are:

"did unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together and with other persons to the grand jurors unknown, to commit certain offenses against the United States of America."

Right at that point ends that first subdivision. Then is taken up this second subdivision, which is an outlining or delineation of what is charged by the indictment to be the federal law which was the alleged object of the conspiracy. I continue:

"to commit certain offenses against the United States of America, that is to say", and then you will find, commencing on page 3, some other paragraphs designated with letters of the alphabet, A, B, C and D. I have since the evidence was concluded and during the argument of Mr. Duhaime been reading over the indictments, and I have re-read paragraphs A, B, C and D. You will find that they differ one from another in this:

'A' sets forth a charge that said defendants while acting as such employees and for said carriers as aforesaid, would collect and receive unjust and unreasonable charges for services rendered and to be rendered in the transportation of passengers over said railroads.

'B' charges a different charge than 'A'—in that the charge is that said defendants would collect and receive from certain persons a greater compensation for services rendered and to be rendered in the transportation of passengers, than they would collect and receive from other persons for doing for such other persons a like and contemporaneous service under substantially similar circumstances and conditions.

'C' differs from 'A' and 'B' in that it charges that one of the objects of the conspiracy was that these defendants, while acting as such employees aforesaid and for said

common carriers as aforesaid would unlawfully make and give undue preferences or advantages to particular persons, and would subject particular persons to undue prejudice and disadvantage.

'D' differs from A, B and C in that as an object of such conspiracy the said defendants, while acting as such employees and for said common carriers as aforesaid, would collect and receive a greater and different compensation for transportation of passengers between Miami, Florida and points without the State of Florida than the rates, fares and charges specified in tariffs filed with the Interstate Commerce Commission in effect at the time.

Now on page 4 following these lettered paragraphs and running down through page 5, you will find some other matter which is incident to the alleged unlawful objects of the conspiracy in the way of a more particular description or delineation of that which has been charged in lettered paragraphs A, B, C and D, and I shall now read to you that language:

"For a more particular description of the object and purpose of said conspiracy and of the methods and means whereby the parties thereto expected and intended to accomplish its objects and purposes, the grand jurors, upon their oaths aforesaid, do further present:

"That during the times herein mentioned the passenger trains of said railroad companies departing from Miami, Florida, for points throughout the United States were loaded to capacity, and the number of passengers seeking space in reserved coach seats and Pullman cars far exceeded the capacity of the available cars, hundreds of persons were daily unable to obtain such accommodations or to make reservations, which condition was brought about and attributable to the war and a heavy tourist season in the Miami, Florida, area, all of which the defendants well knew.

"That numerous persons, particularly superintendents of service at resort hotels in the Miami area, such as the said David Curry, Albert Lee Smith, Morris J. Goldberg, Albert D. Deverich and Elliott Elkin, hereinafter sometimes called said hotel employees, were willing to pay said defendants sums of money in excess of the lawfully established rates for Pullman car space and reserved seats in order to obtain preferences for guests of their respective hotels, and the defendants, while acting as said railroad employees as aforesaid, were in a position to furnish such Pullman car space and coach seats and to make and give undue preference and advantage to persons willing to pay the said defendants sums in excess of the lawfully established tariff for such accommodations and to thereby subject other persons to undue prejudice and disadvantage.

"That the defendants, well knowing the premises aforesaid, did conspire together and with other persons to the grand jury unknown, to make available to said hotel employees for use by guests of said hotels coach seats and Pullman reservations, which but for the payment of money to the said defendants by said hotel employees in excess of the tariff rates would have been available to the general public on a just and equal basis.

"That the said defendants did conspire as aforesaid to collect and receive and accept from the said hotel employees sums of money for said reservations in excess of the lawfully established rates and to make and give to the said hotel employees undue preferences and advantages in the distribution of available space on said railroad trains and to subject others to undue prejudice and disadvantage."

Now, I have read down through page 5, and up to that point this indictment in its analysis includes the grand

subdivision 1 to which I referred, that is, an allegation or charge that there was an agreement of the nature alleged, to-wit, a conspiracy. Grand subdivision 2 is a citation of the federal law which was alleged to have been the object of the conspiracy to violate, with a delineation and explanation of the said unlawful acts. On page 6 the indictment takes up that third subdivision of the indictment, and that is a recitation of overt acts. They are on page 6, page 7 and down well toward the close of the indictment on page 8. They are numbered 1 to 10, inclusive. And the indictment then continues:

"That in pursuance of said conspiracy, combination, confederation and agreement and for the purpose of effecting the object thereof, the said Stanley Howitt, Flora Post Lee and James F. Dewhurst, did do and commit the following overt acts". Then are set out those overt acts.

I shall now take up and analyze this long indictment, consisting of 22 pages. It never has been read to you in its entirety. You will have it in your juryroom to read in its entirety, if you wish, but I am going to explain to you the essential elements of the ten counts of this indictment. You will recall that counts 5 and 6 were withdrawn by dismissal; so you have for your consideration Counts 1, 2, 3, 4, 7, 8, 9 and 10.

If you will remember this, it will be helpful to you. In analyzing this substantive case, No. 6400, in which Mr. O'Rourke is the sole defendant, Counts 1 and 2 have reference to the sale of transportation facilities to one Joel Weiss, Counts 3 and 4 to Zacheus Johnson; Counts 7 and 8 to this man Balz and Counts 9 and 10 to David Bieler.

I take up now Count 1. I believe Mr. Duhaime explained to you and read the first three numbered paragraphs, which were introductory and about which there was really no contest in the case. Paragraph numbered 4 under this First Count reads as follows:

"That at all times herein mentioned the lawful and regular established rate of said Pullman Company for a lower berth from Miami, Florida, to Washington, in the District of Columbia, including tax, was $10.56, said lawful rate for said sleeping car accommodations of the said Pullman Company having been established by schedules or tariffs duly printed, published and filed by the said common carriers with the Interstate Commerce Commission, as required by law, and were on file with said commission and in force and effect at all times herein mentioned."

Count 5 takes up this charge in regard to the individual Joel Weiss. It reads:

"That heretofore, to-wit, on the 26th day of February, A. D. 1944, at Miami, Dade County, Florida, in the Southern District of Florida and within the jurisdiction of this Court, Terence P. O'Rourke, while acting in his said capacity, as such employee of the said Florida East Coast Railway Company and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive from one Joel Weiss a greater compensation for a service rendered and to be rendered in the transportation of passengers subject to the provisions of said Act of Congres than said carriers collected and received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in that he, the said Terence P. O'Rourke, did furnish and sell to said Joel Weiss a ticket for sleeping car accommodations, to-wit, a lower berth, No. 6 in car 72, then and there being operated by said Pullman Co- over the lines of said railroad companies and over said through route from Miami, Florida, to Washington, in the District of Columbia, for which said sleeping car accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $25, which said

sum of $25, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established as aforesaid."

Count 2 also relates to the Joel Weiss transaction, and it differs from Count 1 in that in this second count Terence P. O'Rourke is charged with the substantive offense, in this: That while acting in his said capacity as such employee of said Florida East Railway Company, and while acting for said common carriers as aforesaid, did unlawfully, wilfully and knowingly collect and receive a greater and different compensation for transportation of passengers and for service in connection therewith between Miami, Florida, and Washington, District of Columbia, named in the tariffs aforesaid than the rates, fares and charges specified in said tariffs filed and in effect at the time, in that he, the said Terence P. O'Rourke, did furnish and sell to one Joel Weiss a ticket for sleeping car accommodations, to-wit, a lower berth, No. 6 in car 72, then and there being operated by said Pullman Company over the lines of said railroad companies and over said route from Miami, Florida, to Washington, District of Columbia, for which said sleeping car accommodations said Terence P. O'Rourke did collect and receive as compensation therefor the sum of $25.00, which said sum of $25.00, as said defendant then and there well knew, was a different and greater compensation than that provided and legally established for said accommodations in tariffs filed and in effect at the time as aforesaid."

Now, gentlemen, I am not going to read at length each of these counts; but, as I analyze Count 3, dealing with the Zacheus Johnson transaction, it is similar in its charges as to Count 1 in the Joel Weiss matter.

Count 4, as to Zacheus Johnson, is similar to Count 2, which Count 2 is with reference to the Joel Weiss matter.

Count 7, in regard to the Balz transaction, is similar to Counts 1 and 3. Count 8 is similar to Counts 2 and

4, and Count 9 with reference to the David Bieler transaction, is similar to Counts 2, 3 and 7. Count 10 is similar to Counts 2, 4 and 8.

Gentlemen of the Jury; the conspiracy indictment states the object of the conspiracy. The substantive case against O'Rourke concerns violations of the Interstate Commerce Act.

In the conspiracy case there are four different sections of the Interstate Commerce Act involved; first, by the collection and receipt of unreasonable and unjust charges for service rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for service than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons, and, fourth, by the collection and receipt of greater compensation for service than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by complusion, or by way of gratuity or tips, or by any other device, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission.

It is not necessary for the government to allege or prove that the carrier was a party to the act complained of here,

or that the acts were intentionally committed by the carrier.

A part of the law provides as follows:

"Any common carrier subject to the provisions of this Chapter (this Interstate Commerce Act), or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by said corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein,"—

I have read down to the words "aid or abet". I now give you the law on aiding and abetting. Under the law of the United States there is no distinction between a principal and an accessory, but the law does recognize the doctrine of aiding and abetting, and I charge you that if you find that the defendants aided or abetted in the commission of the offenses charged under the other charges that I have given you, then in that event you should find the defendants guilty. I now give you this as a definition: Aiding and abetting is the actual performance of some act with guilty knowledge and intent, which by its assistance promotes the perpetration of the crime charged.

Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor. The regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charges which may be made. Passenger accommodations should be equally available to the general public.

Now, gentlemen, I am going to give you some general charges with respect to your weighing the evidence.

You are the sole judges of the credibility of the witnesses and of the weight that should be given their testimony. You may judge the credibility of a witness by the manner in which the witness gives his or her testimony; the demeanor of the witness upon the witness-stand; the reasonableness or unreasonableness of the witness' testimony; the witness' means of knowledge as to any fact about which he or she testifies; the witness' interest in the case, if any; the feeling the witness may have for or against the defendants, if any, or any circumstance tending to shed light upon the truth or falsity of such testimony. It is for you at last to say what weight you will give to the testimony of any and all witnesses. If you find that any witness has wilfully sworn falsely to any material fact in the case, you are at liberty to disbelieve the testimony of that witness in whole or in part, or believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances of the case.

It is your duty to reconcile any conflicts which may appear in the evidence as far as may be in your power, on the theory that each witness is sworn to the truth. When this cannot be done, you may consider the conduct of the witness upon the stand, the nature of the evidence given by the witness, how far the witness is corroborated or contradicted by other testimony in the case, and such other facts appearing in the evidence as will in your judgment aid you in determining whom you will believe or will not believe, and you may also, in considering whom you will believe or will not believe, take into account your experience and relations among men.

Gentlemen, I now define for you and explain at some length just what is a criminal conspiracy. A conspiracy cannot be formed by one person, because a person cannot conspire with himself. A conspiracy must be between two or more persons. In order to make the offense of conspiracy punishable one or more overt acts must be committed pursuant to and for the purpose of carrying out

the conspiracy. Common design is the essence of the charge of conspiracy. While it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose, it is not necessary, in order to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for the unlawful purpose, or that they should directly by words or in writing state what the unlawful scheme was to be and the details or plans by which the unlawful combination shall be made effective. It is sufficient that two or more persons in any manner or through any contrivance, openly or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Where an unlawful result is sought to be effected, and two or more persons actuated by a common purpose to accomplish that end, work together in any way in pursuance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein may be a subordinate one and was to be executed at a remote distance from the other conspirators. Mere knowledge does not make one a member of an unlawful conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of some overt act, or even participation in the overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

With reference to that portion of the indictment in the conspiracy case outlining the socalled overt acts, these overt acts are alleged in the indictment as being detailed statements of that which the grand jury charges were acts committed by the unlawful conspiracy or some member thereof toward carrying out such unlawful agreement, confederation or conspiracy. The government is not required to prove more than one of such overt acts, but before you can convict the defendants of the conspiracy

charge you must be satisfied beyond a reasonable doubt, first, that the conspiracy existed; second, that at least one of the overt acts was committed as alleged, that is, as an act toward carrying out such unlawful agreement or combination.

Conspiracy may be established by circumstantial evidence. If all of the evidence taken together shows that these defendants in the conspiracy case cooperated and worked together with a common understanding and for the common purpose as charged in the indictment, that is sufficient.

As I have already indicated to you, it is not essential that each conspirator take an active part in carrying out the purpose of the conspiracy. All who enter into the conspiracy are bound by the acts of each conspirator, whether the same are known to the others or not, provided that the purpose of the act was to carry out the purpose of the conspiracy.

Since I have charged you that you may consider circumstantial evidence in connection with the conspiracy case, I now give you a definition of circumstantial evidence and the rule or standard by which to gauge it.

Circumstantial evidence is proof of independent facts which if proven beyond a reasonable doubt another fact would follow from the facts already proven. Guilt established by circumstantial evidence is an inference of guilt from other facts independently proven. Proof by circumstantial evidence is proof of one fact by the proof of the existence of certain other facts. Guilt, if established by circumstantial evidence, must to the satisfaction of the jury be reasonably, naturally and probably inferred beyond every reasonable doubt from the existence of other facts proved, and such inference of guilt must be consistent only with guilt and not consistent with innocence. These independent facts or circumstantial evidence must be proved beyond a reasonable doubt as independent facts

and leading to such conclusion under the rule that I have stated.

It is for you to determine from all of the evidence in the case whether the acts and conduct of the defendants in the conspiracy case, as shown by the evidence, are consistent only with the guilt of the defendants in the conspiracy case and inconsistent with their innocence.

The defendants are presumed to be innocent until the contrary has been shown beyond every reasonable doubt. This presumption of innocence attends the defendants throughout the trial. The burden of proof rests upon the government to make out and prove to the satisfaction of the jury beyond every reasonable doubt every material allegation in the indictments, and unless that has been done the jury should acquit the defendants. The burden of overcoming this presumption rests upon the government, and never shifts to the defendants, and unless the government has satisfied this requirement, the jury should acquit the defendants. In that statement of the law I used a legal term that is, reasonable doubt. I now give you a definition of that term. Reasonable doubt does not mean every possible doubt, but reasonable doubt means that kind of a doubt that would suggest itself to a reasonable man and of such weight as to deter him from acting or deciding in matters of the highest importance to him. By reasonable doubt is not meant a speculative or suppositious doubt. It simply means what the expression implies, and that is a doubt for which a reasonable man can give a reason.

If after you have carefully considered and weighed all of the evidence in the light of the law which the Court has now given you, you have a full, firm and abiding conviction to a moral certainty that the defendants are guilty as charged in the indictments, then their guilt has been established beyond every reasonable doubt. If you do not have such a full, firm and abiding conviction, then their guilt has not been established beyond a reasonable doubt. The law does not require a person to be proven guilty be-

yond a mathematical certainty, but only to a moral certainty.

I have in my hands two forms of verdicts, and you must return separate verdicts, one in each case. (Reads forms of verdict.)

You may retire, gentlemen, and consider of your verdicts.

(Jury retires to jury-room.)

The Court:

There were certain written requested charges submitted by the government, which were partially given and partially refused, and marginal notations thereon indicate the action of the Court. Wherein a request was refused, an exception is granted to the government, and wherein these specific charges were given, an exception will be noted in favor of the defendants. Are there any other exceptions to the Court's charge or requests for further instructions? I will first hear from the government.

Mr. Duhaime:

Your Honor, I think you should, in all fairness to the defendants, charge them that the evidence against O'Rourke in the substantive case should not be considered against the other three defendants in the conspiracy case, and likewise that the evidence in the conspiracy case should not be considered against O'Rourke in the substantive case.

Mr. Riley:

I wish to except to the charges or portions of charges or instructions numbered 1, 2, 3, 7, 8 and 9, which I now read. These are all the exceptions that I have to your charges.

The Court:

Exceptions allowed.

The Court:

Bring the jury back.

(Jury returns to Courtroom.)

The Court:

Gentlemen of the Jury, I think the only inference which you could draw from the charge is that which I now state, but out of an abundance of precaution I give you this charge: that the evidence that you heard in connection with case No. 6400 against Mr. O'Rourke should not be considered as against the defendants in the conspiracy case; likewise, the evidence in the conspiracy case should not be considered against Mr. O'Rourke, the defendant in case No. 6400. You may retire and consider of your verdicts.

(Jury retires to Jury room.)

The Marshal:

Your Honor, the jury requests further instructions.

The Court:

Bring the jury in.

(Jury returns to the Courtroom.)

The Court:

Mr. Foreman, the Marshal informed me that you desired some further instructions. Is that right?

The Foreman:

We did want to ask a question of the Court, but in the meantime we reached a verdict.

The Court:

Are you ready to report now?

The Foreman:

Yes, sir.

The Court:

Receive the verdicts, Mr. Clerk.

(Verdicts returned and published.)

(Trial concluded.)

Inasmuch as the several matters objected to or insisted upon and considered by the Court, do not appear by the record, and the said defendants, Stanley Howitt, Flora Post Lee and James F. Dewhurst and Terence P. O'Rourke, did on the 28th day of February, 1945, during said term, proposed this their Bill of Exceptions and the rulings of said Judge and request him to sign the same, which, after due notice to the United States Attorney, is done this 28th day of February, 1945, at Miami, Florida.

I further certify that the foregoing Bill of Exceptions contains all of the evidence introduced in the trial of the above entitled cause, and all of the charges and motions for directed verdicts.

Dated at Miami, Florida, this March 1st, 1945, as of JWH this 28th day of February, 1945.

JOHN W. HOLLAND,
(John W. Holland)
District Judge.

315 CLERK'S CERTIFICATE.

United States of America,
Southern District of Florida, ss,

I, EDWIN R. WILLIAMS, Clerk of the District Court of the United States for the Southern District of Florida, do hereby certify that the foregoing pages numbered from 1 to 315, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings and evidence in cases styled United States of America, plaintiff, vs. Stanley Howitt, Flora Post Lee, and James Dewhurst, defendants, No. 6399-M-Cr., and United States of America, plaintiff, vs. Terence P. O'Rourke, defendant, No. 6400-M-Cr. as appear upon the records and files of my office that have been designated by written directions of the parties to be included in this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 23rd day of March, A. D. 1945.

(Seal)

EDWIN R. WILLIAMS,
Clerk of the District Court of the United States for the Southern District of Florida.

By EARLE F. SPRIGG,
Deputy Clerk.

[Stamp:] U. S. Circuit Court of Appeals. Filed Apr. 24, 1945. Oakley Fe Dodd, Clerk

SUPPLEMENTAL TRANSCRIPT OF RECORD.

UNITED STATES

CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 11,287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the District Court of the United States for the Southern District of Florida.

(SUPPLEMENTAL RECORD RECEIVED APR. 21/45.)

1—354

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

No. 11,287.

STANLEY HOWITT, FLORA POST LEE, JAMES DEW-HURST AND TERENCE P. O'ROURKE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the District Court of the United States for the Southern District of Florida.

It Is Hereby Agreed between counsel for Appellants and counsel for Appellee that the Clerk of this Court print a supplement to the Transcript herein, and include therein the following instructions:

Government's Request for Instruction No. 1.

Given:

The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Com-

mission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission.

Government's Request for Instruction No. 2.

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

Not Given:

Their commission by a person acting for or employed by the carrier is sufficient to constitute an offense under Section 10 of the Act.

"• • • it is immaterial whether what he does or fails to do in violation of the statute is with or without the orders of his principal."

Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 736;
United States v. Tozer, 37 Fed. Rep. 635.

Government's Request for Instruction No. 3.

Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein, * * *"

Not Given:

Aiders and abetters as used in Section 10 include employees of the carrier and they are responsible as principals.

The defendants here, employees of the carrier, are contemplated within the provisions of Section 10 as aiders and abetters, and if you find as charged by the Government, they are responsible as principals under Section 550, Title 18, United States Code.

Government's Request for Instruction No. 4.

Refused:

Discrimination under the statute by an employee, ticket agent, is possible, though the carrier may not have participated in the unlawful profits and may not be chargeable through some official or vice-principal. The ticket agent in such case may be prosecuted under the statute as the principal, the crime of aiding and abetting being by statute made a substantive offense. It follows

that as an aider or abettor under the statute, the ticket agent is a principal and not an accessory.

Government's Request for Instruction No. 5.

Refused:

The regularly established rates for transportation of passengers and for Pullman accommodations duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. The defendants are charted with notice of it, and they must abide by it. This rule embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. R. Co. v. Maxwell, (Tenn. 1915) 237 U. S. 94, 97.

Government's Request for Instruction No. 6.

Refused:

The whole purpose of the Interstate Commerce Act is to secure public service at reasonable and uniform rates, and this purpose is obviously defeated when an employee of a carrier under color of his office, without the collusion of the carrier, and for his sole benefit, requires purchasers to pay for a ticket a greater compensation than the established rate. The desired aim is uniform and reasonable rates to the public using the facilities of the carrier and equality of opportunity in obtaining the use of transportation facilities, so that all persons may carry on their activities on an equal basis. A person who wilfully sells or furnishes a service at a rate different from the established uniform rate or wilfully prefers particular persons in the sale and distribution of transportation facilities to the prejudice or disadvantage of other persons

violates the spirit as well as the letter of the law and commits a misdemeanor under Section 10.

United States v. Estes, 6 F. (2d) 902, 905;
Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461.

Government's Request for Instruction No. 7.

Given:

Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor.

Not Given:

If you find that the defendants were paid in excess of the regularly scheduled rates and gave undue advantages therefor, the defendants have committed a discrimination and preference within the contemplation and language of the Act.

Government's Request for Instruction No. 8.

Given:

The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made.

Not Given:

If you find that a charge in excess of the scheduled tariff was made for services contemplated by the regular fare, then such excess charge is unreasonable and unjust within the meaning of the statute (Sections 1(5) and 6(7).

Louisville & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.
Part 3 of memorandum, particularly that part contained on pp. 21-24.

Government's Request for Instruction No. 9.

Given:

Passenger accommodations should be equally available to the general public,

Not given:

So if you find that the defendants conspired to make transportation facilities or Pullman space available for the use of persons who paid them more than the regular fare, then your yerdict should be guilty.

Government's Request for Instruction No. 10.

Refused:

If you find that it was in the power of the defendant ..... to assign reservations of space for the accommodation of passengers, and that the other defendants and ..... conspired to collect sums of money in consideration for which they would prefer the person who paid them in the distribution of Pullman space and thus subject other persons to disadvantage, then your verdict should be guilty.

*Insert name of diagram clerk.

Dated at Miami, Florida, this 20th day of April, 1945.

BART. A. RILEY,
Attorneys for Appellants.
ERNEST L. LUHAIME,
Attorneys for Appellee.

[fol. 272] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 23rd, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by Bart A. Riley, Esq., for appellants, and Ernest L. Duhaime, Esq., Assistant United States Attorney, and Irvin Goldstein, Esq., Assistant to Attorney General, for appellee, was submitted to the Court.

[fol. 273] OPINION OF THE COURT—Filed June 14, 1945

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the Southern District of Florida

(June 14, 1945)

Before Holmes, McCord, and Lee, Circuit Judges

HOLMES, Circuit Judge:

Appellants Howitt and Dewhurst, ticket sellers of the Florida East Coast Railway Company, and appellant Lee, diagram clerk for the railroad, all located at Miami, Florida,

were indicted for conspiracy to violate the Interstate Com-
[fol. 274] merce Act [1] by agreeing together and with other persons unknown to charge and collect from purchasers of transportation accommodations money in excess of the regular fares currently in force under prevailing tariffs for such service. Appellant O'Rourke, a ticket seller for the same carrier in Miami, was charged on an indictment in ten counts with committing substantive offenses in violation of the act in substantially the same manner as alleged in the conspiracy charge. The indictments were consolidated and tried together; the defendants were convicted and have appealed.

It is contended that the trial court erred in

1. Overruling demurrers to the indictments;

2. Sustaining demurrers to the pleas in bar;

3. Overruling defendants' motion for a directed verdict based upon the insufficiency of the evidence; and

4. Giving certain instructions to the jury.

The demurrers to the indictments were grounded upon the theory that the Interstate Commerce Act, the aim of which was the prevention of discrimination by carriers, did not create any offense against others than carriers except where the carrier was the principal offender and individuals aided and abetted. Upon this premise it is argued that, since these indictments charged violations by individuals only, without alleging the participation or connivance of any carrier, the indictments charged no offense against the United States.

While it is probable that the legislative mind did not foresee offenses of this particular character when the law was passed, nevertheless the act was drafted in language [fol. 275] sufficiently broad to include such offenses by individual employees of a carrier, especially where the offenses resulted in the unjust discrimination that the act was designed to prevent.[2] Section 1(5) of the act re-

[1] 49 U. S. C. A., Sections 1 et seq.

[2] Interstate Commerce Commission v. Baltimore, 145 U. S. 265; Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197; L. & N. R. Co. v. United States, 282 U. S. 740; Mitchell v. United States, 313 U. S. 80; Kirkpatrick v. United States, 195 So. 692.

quires that all charges made for any service rendered in the transportation of passengers shall be just and reasonable. The schedule of rates required to be established, published, and filed with the Interstate Commerce Commission, is *prima facie* the criterion in determining whether or not a charge is reasonable.[3] Section 2 of the act provides that no carrier shall receive from any person a greater or less compensation for any service in the transportation of passengers than it received from any other person for the same service. Section 10 of the Act provides that where the carrier is a corporation, any person employed by the corporation who willfully does anything prohibited or declared unlawful by the act, or aids and abets therein, shall be guilty of a misdemeanor.

This question has been raised and decided in other cases. In *United States v. Peterson*, 1 F. (2) 1018, a demurrer was sustained to a similar indictment on the very ground that is here urged, namely, that since no common carrier was charged with guilt as a principal, the carrier's employees could not be guilty because they were not of the class that alone could commit the acts denounced as offenses by the statutes. This district court opinion stands alone, according to our research, and the great weight of authority is on the other side.

In *United States v. Tozer*, 37 Fed. 637, the demurrer to a similar indictment was overruled on the ground that "when an agent of a railroad is prosecuted under the [fol. 276] statute for an unlawful act, it is not necessary . . . either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction." The *Tozer* case was expressly approved by Judge Taft in *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730. There a locomotive engineer was held subject to the penalties of Section 10 of the Interstate Commerce Act where he, while acting as engineer, refused to handle interstate freight for a shipper, the court saying that it was immaterial whether what he did or failed to do was with or without the orders of his principal. The well-reasoned opinion in *United States v. Estes*, 6 F. (2) 902, is to the same effect, and the Supreme Court

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[3] Kinnavey v. Terminal R. Association of St. Louis, 81 Fed. 802.

recently held in *Union Pacific Railroad Company v. United States*, 313 U. S. 450, that action by any person to bring about discrimination in respect to the transportation of property is made unlawful by the Elkins Act. Considerations similar to those here mentioned led the court to adopt this view. These authorities, together with the thought that any other conclusion would do violence to the purpose of the act, constrain us to hold that the demurrers to the indictments were properly overruled.

The plea in bar to each indictment was based upon the claim that the defendants were made witnesses against themselves under legal compulsion, and that the evidence so produced was used to indict and convict them, wherefore they were entitled to the immunity extended by Sections 43, 46, and 47 of the Interstate Commerce Act. These statutes provide that in summary proceedings in the district court, or in hearings before the Interstate Commerce Commission, or in any other cause or proceeding, where the purpose of the proceeding is to inquire into alleged violations of the act, no person shall be prosecuted or subjected to any [fol. 277] penalty or forfeiture for any matter concerning which he may testify or produce evidence in such proceeding.

On March 3, 1944, warrants for the arrest of the defendants were issued to the Federal Bureau of Investigation for violations of the Interstate Commerce Act. On March 4, 1944, agents of the F. B. I. separately asked each of the defendants to come to their offices for interrogation. The warrants were not then produced, and the defendants were not then arrested, but each came willingly. After being separately questioned for four or five hours, each signed a statement that set forth the facts given in response to questions asked. They were then arrested, arraigned, and granted bail. Several days later the agents again questioned each defendant, but no claim is made that any statement given was induced by wrongful means.

Section 48 of the Interstate Commerce Act reads as follows: "Under the immunity provisions in Sections 43, 46, and 47 immunity shall extend only to natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." This statute requires no elucidation. We need only observe that, since the evidence produced by the defendants was not

given in response to a subpoena and was not under oath, it did not come within the cited immunity provisions.

We need not pause long upon the third and fourth assignments. The railroad company by whom these defendants were employed was a common carrier subject to the Interstate Commerce Act, and its lawful rates had been filed with the Interstate Commerce Commission. The rates specified therein were the only charges that could legally be [fol. 278] exacted for the services rendered.[4] The evidence adduced upon the trial proved beyond question that the defendants repeatedly and systematically took advantage of the prevailing war-time congestion in transportation to exact from applicants for accommodations more money than the regular rate prescribed, and appropriated the difference to themselves. It is also clear that the excess payment ordinarily was not a gratuity given for service, but a substantial fee paid as a condition precedent to securing a ticket, and that in either event the necessary result of the overcharge was to assess rates in excess of prevailing tariffs and to discriminate between passengers. This evidence not only warranted the submission of the case to the jury, but also made appropriate the instructions to which exceptions were taken. The crucial question for the jury was whether the offenses charged had been committed; the method thereof had no legal significance.[5]

Affirmed.

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[4] L. & N. R. Co. v. Maxwell, 237 U. S. 94; Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. 285.

[5] N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 398; Armour Packing Company v. United States, 209 U. S. 72; Union Pacific R. Co. v. United States, 313 U. S. 450, 462.

[fol. 279] JUDGMENT

Extract from the Minutes of June 14th, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST and TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

[fols. 280-290] PETITION FOR REHEARING—Filed July 5, 1945

PETITION FOR REHEARING.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT.

Come now Stanley Howitt, Flora Post Lee and James F. Dewhurst, appellants in the "conspiracy case", and Terence P. O'Rourke, appellant, in "substantive offenses" case, and requests a rehearing of said cause, in which final judgment was rendered by this court on June 14, 1945, affirming the judgment of the court below; and in support of this petition respectfully shows:

I.

That this honorable Court inadvertently stated in the opinion that the defendants (Howitt, et al.) were indicted for conspiracy "to CHARGE AND COLLECT from purchasers of transportation, etc.", when the indictments in the conspiracy case and O'Rourke case, allege that the defendants did "COLLECT AND RECEIVE" money in excess of the prevailing tariff rates, although both Sections 2, and sub-section 7 of Section 6, Title 49, uses the language: "CHARGE, DEMAND, COLLECT, RECEIVE", but the person who drafted the indictments refrained from the use of the words "CHARGE" and "DEMAND".

II.

The opinion of this honorable Court is bottomed upon the premise that the defendants did "col-

lect from purchasers of transportation accommodations *money in excess of the regular fares currently in force under prevailing tariffs* for such service." This, following the reasoning of the court, (and particularly with reference to the O'Rourke case), is a violation of Sub-section 7 of Section 6, which, after providing for the filing and publishing of rates, says "nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time, * * *". And the court overlooked that a violation of such section of the Interstate Commerce Act is a misdemeanor under Section 10, and subjects the offender "TO A FINE OF NOT TO EXCEED $5,000 for each offense." The defendant O'Rourke's indictment by its allegation is not based on Section 2 of the Act which covers "Special rates and rebates" and for the violation of which "such common carrier shall be deemed guilty of UNJUST DISCRIMINATION, which is prohibited and declared to be unlawful," and he is not subject to imprisonment under the proviso to Section 10. Therefore the judgment against O'Rourke of imprisonment for the period of eighteen months on counts 1, 2, 3, 4, 7, 8, 9, and 10 of the indictment, to run concurrently, should be reversed. (He was fined $1,000 in addition—R. P. 67).

III.

Without repeating the recitations in paragraph II of this petition, but incorporating them herein, it is respectfully suggested that the court overlooked that portion of the opinion in *United States v. Estes*, 6 F.(2d) 902, reading: "That rate having been ascertained, all other rates become unlawful and any corporation or person who sells or attempts to sell or furnish a service for a different rate, violates the spirit as well as the letter of the law, AND COMMITS A MISDEMEANOR UNDER SECTION 10." (Italics supplied.) Therefore O'Rourke is only subject to the fine of $1,000 imposed by Judge Holland, and the judgment as to imprisonment is unlawful. (Note: Roy H. Johnson, Clerk, United States District Court, Chicago, Illinois, in response to writer's recent request, wired writer that "On June 30, 1925, Estes and Kinnet pleaded guilty. Estes fined $100.00, Kinnett $200.00. No costs. Fines paid.").

IV.

Although the odd-numbered counts in the O'Rourke indictment conclude "Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10)", the allegations therein reveal that the offense in fact was the receipt of a stated amount of money above the tariff schedule, and those counts are therefore similar to the even-numbered counts, and based upon the opinion of the honorable Court, the imprisonment sentence as to O'Rourke should be set aside.

V.

This honorable Court, in citing the *Tozer* case, 37 Fed. 637, overlooks the fact that the railroad company, in that case, and not the agent, received the extra freight charges thus differentiating that case from the case at bar. (See Charge of Court in *U. S. v. Tozer*, 39 Fed. 369.)

VI.

This honorable Court, in its opinion, overlooked the construction of the Interstate Commerce Act by the Congress and the departmental construction by Interstate Commerce Commission in this particular, that when it came to the attention of the Congress, and the enforcement agency that employees of railroad companies were accepting gifts, gratuities, and bribes, for the purpose of influencing the decision of the employees with respect to the supply, distribution or movement of cars or other vehicles, or vessels, used IN THE TRANSPORTATION OF PROPERTY (emphasis supplied), the Congress enacted legislation to curb such evil, to-wit:

Title 49, Sec. 1, Sub-section (17), (b) reads as follows:

> "It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting

for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property."

VII.

This honorable Court, in construing the Interstate Commerce Act, overlooked that in 1889, when it came to the attention of the Interstate Commerce Commission and the Congress that shippers were paying money or other thing of value, to induce carriers or agents to discriminate in regard to shipping of property, the Congress enacted what is now Section 10, paragraph 4, reading as follows:

(4) If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of

value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this part, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

VIII.

And the Court in its construction of the Interstate Commerce Act, overlooked that in 1889, in

regard to false billing as now contained in Sec. 10, Par. 2, the Congress stated:

> "Any common carrier subject to the provision of this act, or, whenever such common carrier is a corporation, any *officer or agent thereof, or any person acting for or employed by such corporation*, who, by means of false billing," etc.

shall permit property to be transported at less than the regular rates, shall be guilty of a misdemeanor, and omitted to use similar language in its statutes of 1889, amending Sec. 6, Par. 7, relating to rates, rebates and privileges, in its statutes of 1920, amending Section 2 and 3 of the Act relating respectively to rebates and undue preferences.

IX.

When the court states that "the act was drafted in language sufficiently broad to include offenses by individual employees," etc., although the legislative mind did not "forsee offenses of this particular character when the law was passed," the court overlooked a guide to construction of legislative acts as prescribed by our Supreme Court and epitomized in the opinion of Mr. Justice Butler, in *Lanzetta v. State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, wherein he says:

> "It is the statute, and not the accusation under it, that prescribes the rule to govern conduct and warn against transgression,"

and "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

X.

The court overlooked, in the opening sentence of its opinion, that the conspiracy indictment covered the commission of four distinct offenses, described under paragraphs A, B, C, and D, and which, in the charge (R. P. 251) of trial Judge Holland, were described as

> "In the conspiracy case there are four different sections of the Interstate Commerce Act involved; first by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second by the collection and receipt from certain persons of greater compensation for service than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons, and, fourth, by the collection and receipt of greater compensation for service than the rates specified in the tariffs filed with the Interstate Commerce Commission,"

while this Honorable Court, in its opinion, says that the defendants conspired "to charge and collect from purchasers of transportation accommo-

dations money in excess of the regular fares currently in force under prevailing tariffs for such service," and further concludes; "This evidence not only warranted the submission of the case to the jury, but also made appropriate the instructions to which exceptions were taken," and with this stated premise and conclusion, the court overlooked the serious injury to the defendants by the giving of the charge (R. P. 251):

> "The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other devise, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

Said charge deprived the defendants of any defense, even in an instance where a witness handed out $15.00 for a Pullman ticket costing $12.43, and

told the agent to "keep the change." (R. P. 222 and 233.)

Wherefore it is respectfully requested that the court will grant this petition for rehearing.

Respectfully submitted,

BART. A. RILEY,
A. C. DRESSLER,
Attorneys for Appellants.

I, Bart. A. Riley, of Counsel for the appellants herein, do certify that the foregoing petition is not presented for the purpose of delay, and is in the opinion of counsel, well founded in point of law.

BART. A. RILEY

STATE OF NEW YORK,
COUNTY OF ALBANY.

I, Bart. A. Riley, being duly sworn, say that on the 2nd day of July, 1945, at Albany, N. Y., I personally mailed a copy of the foregoing petition, in a securely sealed, addressed envelope, with proper United States postage affixed, to each of the following at the address indicated:

HON. TOM C. CLARK,
Attorney General,
Washington, D. C.

HON. IRVIN GOLDSTEIN,
Attorney, Department of Justice,
Washington, D. C.

11

Hon. Herbert S. Phillips,
United States Attorney,
Tampa, Florida.

Hon. Ernest L. Duhaime,
Asst. U. S. Attorney,
Miami, Florida.

BART. A. RILEY

Subscribed and sworn to
before me July , 1945.

Notary Public.

[fol. 291] ORDER DENYING REHEARING

Extract from the Minutes of July 18th, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST and TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 292] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 293] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Office - Supreme Court, U.S.
FILED
AUG 21 1945
CHARLES ELMORE CROPLEY
CLERK

No. 354

IN THE

Supreme Court of the United States

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BART. A. RILEY,
Counsel for Petitioners,
1030 Seybold Bldg.,
Miami, Florida.

IN THE

Supreme Court of the United States

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of Matter Involved

Petitioners Howitt and Dewhurst, ticket sellers for the Florida East Coast Railway Company, petitioner Lee, diagram clerk for the railroad, all located at Miami Florida, were indicted for conspiracy to violate the Interstate Commerce Act, by agreeing to collect and receive from purchasers of passenger transportation accommodations money in excess of the regular fares currently in force under prevailing tariffs for such service. Petitioner O'Rourke, a ticket seller for the same carrier was charged on an indictment in ten counts with committing substantive offenses in violation of the Act in substantially the same manner as alleged in the conspiracy count. The indict-

ments were consolidated and tried together, the defendants were convicted, and appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed.

These petitioners, in addition to receiving and accounting to the carrier for the regular passenger tariff fare, collected in addition extra compensation in the way of tips or gratuities; they were not indicted for charging and demanding this extra money, but only for collecting and receiving it. (Secs. 1, et. seq., 49 U. S. C. A.) However had the transportation of property been involved an offense would have been committed under Sec. 1, sub-sec. (17) (b), where bribery is punished, if accepted for moving cars; through shipper or other inducement. This bribery section is not contained in any portion of the act having to do with the transportation of passengers.

In the trial court defendants maintained by demurrer, motion for directed verdict, and exception to the court's charge that for the acts of accepting tip, gratuities, or bribes, by whatsoever name the extra money was accepted by them, they did not offend against the Commerce Act, for the Act, so far as passenger traffic was concerned, dealt only with the carrier as a principal, and if the employee turned over to the carrier the proper tariff charge collected, and kept the tips, no offense was committed; that the Act, since its enactment in 1887, never contemplated that such offenses were within the purview of the Act. Again it was maintained that the Act was so vague, in its terms, as not to come within the scope of a proper and legal criminal statute.

The trial court, in its ruling on the demurrer to the indictment, on the motion for directed verdict, and in its charge, construed the Interstate Commerce Act, contrary to its plain wording and intent, in specifically holding that if an agent received a tip, when he sold a ticket, he would be violating the act.

The appellate court held that "while it is probable that the legislative mind did not foresee offenses of this particular character when the law was passed, nevertheless the act was drafted in language sufficiently broad to include such offense by individual employees of a carrier, especially where the offenses resulted in unjust discrimination that the act was designed to prevent" (Opinion not reported).

Jurisdictional Statement

The statutory provisions believed to sustain the jurisdiction of this Court are Section 241, Judicial Code (Section 347, Title 28, U. S. Code), and (Act of June 7, 1934, ch. 426, 48 Stat. 926).

The statutes involved are sections 2, 3, subsection 7 of 6 and 10, part I, Interstate Commerce Act, U. S. Code, Title 49, sec. 2, sec. 3, subsec. 7 of sec. 6 and sec. 10; all originally being a part of the Act of Congress of February 4, 1887, c. 104, 24 Stat. 382, as amended.

Section 2 provides:

> "If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3 provides:

"(1) Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; PROVIDED, HOWEVER, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic or any other carrier or whatever description."

Sub-section 7 of Section 6 provides:

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any

privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 10 provides:

"Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; PROVIDED, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

Date of Judgment Sought to be Reviewed

The United States Circuit Court of Appeals of the Fifth Circuit on June 14, 1945 entered its judgment of affirmance of the judgment of the United States District Court for the Southern District of Florida, entered in turn on the 3rd day of February 1945. Rehearing denied July 18, 1945 by Appellate Court.

Questions Presented

Are ticket sellers of a railroad corporation involved in Interstate Commerce transportation, amenable under the provisions of the Interstate Commerce Act for accepting tips, gratuities or bribes from passengers, in addition to the regular tariff rate, when they hand over such regular tariff rate to their employer, and simply retain the tips?

Reasons for Allowance of the Writ

a. This case is the first of its kind to be tried in a District Court and appealed to a Circuit Court of Appeals since the enactment of the Interstate Commerce Act in 1887, but there are pending and undisposed of in the District Courts throughout the country many cases involving the same offense.

b. There is pending before the Committee on Interstate and Foreign Commerce, H. R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act.

c. The appellate court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

d. The appellate court in this instance has decided a federal question in a way probably in conflict with decisions of this Court, in that the statutes under which the defendants were tried are so vague, indefinite and insufficient as not to cover the facts, whereas this Court has said "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." *United States* v. *Lacher*, 134 U. S. 624, 628.

Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of record of all proceedings of the said Circuit Court of Appeals in said case therein entitled Stanley Howitt, Flora Post Lee and James F. Dewhurst (Case No. 1) and Terence P. O'Rourke (Case No. 2) Appellants, versus United States of America, Appellee, No. 11287, to the end that the said case may be reviewed and determined by this Court and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and that the said judgment of said Circuit Court of Appeals may be reversed by this honorable Court.

And your petitioners will ever pray.

BART. A. RILEY
Counsel for Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BART. A. RILEY, being first duly sworn, deposes and says that he is counsel for petitioners named in the foregoing petition; that he prepared the same, and that the matters and things therein set forth are true as he verily believes.

BART. A. RILEY.

Sworn to and subscribed before me
this 16th day of August, A. D. 1945.

EMMA LEONA,
Commissioner of Deeds,
New York.

Note

The cases cited by the appellate court follow with a parenthetical note.

United States v. *Estes*, 6 F. (2) 902 (ticket sold by pullman conductor at less than legal rate, and proceeds probably embezzled).

United States v. *Peterson*, 1 F. (2) 1018. (Receipts from sale of ticket embezzled by ticket seller.)

United States v. *Tozer*, 37 Fed. 637. (Freight proceeds received by agent of railroad company and remitted to railroad, but contention was made that money was higher than tariff rate.)

Union Pacific Railroad Company v. *United States*, 313 U. S. 450. (An equity suit concerning freight which involved an interpretation of the Elkins Act.)

Therefore, petitioners are lacking in authorities which relate to the matter at bar and refrain, in the interest of brevity, from filing a brief which could not supplement, without over-emphasis, the matters set forth in the petition.

FILE COPY

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DEC 28 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,
Petitioners,
vs.
UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING A VERDICT AND SENTENCE OF THE UNITED STATES DISTRICT COURT, AT MIAMI, FLORIDA.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 351

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING A VERDICT AND SENTENCE OF THE UNITED STATES DISTRICT COURT, AT MIAMI, FLORIDA.

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of appellate court (R. 272-276) is reported at 150 F. 2nd 82. The opinion of the trial court overruling

petitioners' demurrers to the indictment appears at pages 12-17 of the record, and is reported in 55 Fed. Supp. 372.

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1945 (R. 277); petition for rehearing (R. 278-287), was denied July 18, 1945 (R. 289). Writ of certiorari was granted by this Honorable Court on October 15, 1945. The jurisdiction of this Court is invoked under Section 241 of the Judicial Code (Sec. 147, Title 28 U.S. Code). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court May 7, 1913, and Acts of June 7, 1934, Ch. 426, 48 Stat. 926.

The jurisdiction of this Court is invoked on the following grounds:

a. This case is the first of its kind to be tried in a District Court and appealed to a Circuit Court of Appeals since the enactment of the Interstate Commerce Act in 1887, but there are pending and undisposed of in the District Courts throughout the country many cases involving the same offense.

b. There is pending before the Committee on Interstate and Foreign Commerce, H. R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act.

c. The appellate court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

d. The appellate court in this instance has decided a federal question in a way probably in conflict with decisions of this Court, in that the statutes under which the defendants were tried are so vague, indefinite and insufficient as not to cover the facts, whereas this Court has said "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." **United States v. Lacher**, 134 U. S. 624, 628.

STATEMENT OF THE CASE

Petitioners Howitt and Dunhurst, ticket sellers of the Florida East Coast Railway Company, and appellant Lee, diagram clerk for the railroad, all located in Miami, Florida, were indicted for conspiracy to violate the Interstate Commerce Act (49 U.S.C.A. Secs. 1, et seq.) by agreeing together and with other persons unknown to commit the following offenses against the United States:

A. That they would collect and receive unjust and unreasonable charges for services rendered and to be rendered in the transportation of passengers in violation of Section 1 of the Interstate Commerce Act (the indictment is based on Sec. 1, 65 A, Title 49 U.S.C.).

B. That they would collect and receive from certain persons a greater compensation for services rendered in the transportation of passengers than they would collect and receive from other persons for doing for such other persons a like and contemporaneous service in the transportation of a like kind of traffic, in violation of Section 2 of the Act (Sec. 2, Title 49, U.S.C.).

C. That they would unlawfully make and give undue preferences or advantages to particular persons and would subject particular persons to undue prejudice and disadvantage in violation of Section 3 of the Act. (Sec. 3, Title 49, U.S.C.).

D. That they would collect and receive a greater and different compensation for transportation of passengers from Miami to other points without the State of Florida than the rates, fares and charges specified in tariffs filed with the Interstate Commerce Commission, in violation of Section 6 of the Act (Sec. 6, Title 49, U.S.C.).

The matters set forth in the above designated paragraph (D) are not a violation of Section 6, but are covered by Section 7, Title 49, U.S. Code. The indictment is contained in the record, pages 1 to 8.

Appellant O'Rourke, a ticket seller for the same carrier in Miami, was charged in a ten-count indictment with committing substantive offenses in violation of the Act in substantially the same manner as alleged in the conspiracy charge. The indictments were consolidated and tried together. A demurrer to the conspiracy count is contained on page 9 of the record and as to O'Rourke, on page 50 of the record. The demurrer was overruled (R. 55); the motion for directed verdict was denied (R. 239); exceptions were made to the charges of the court (R. 257).

The Government requested (Supp. R. 1) and the court gave the charge as requested (R. 251); During the entire trial the question was raised by the defendants in the lower court that the receipt of tips, gratuities or

bribes by the defendants did not constitute a crime under the Interstate Commerce Act, where the evidence disclosed that the passengers paid the proper tariff rate which in turn was handed over to the transportation and Pullman companies, and the only money retained by the ticket sellers were the tips and gratuities; or bribes. The gist of the case is contained in the court's charge (R. 251) which is quoted:

> "In the conspiracy case there are four different sections of the Interstate Commerce Act involved; first, by the collection and receipt of unreasonable and unjust charges for service rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for service than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons, and, fourth, by the collection and receipt of greater compensation for service than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation

> of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission".

The Government requested (p. 5, Supp. R.) two charges, which were consolidated by the court and given as follows:

> "Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor. The regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charges which may be made. Passenger accommodations should be equally available to the general public."

That the money received by the ticket sellers was in the form of tips is evidenced by the testimony of David Curry (R. 125, 128, 137); Elliott Elkin (R. 141, 142, 147); Albert Deverich (R. 156); Morris Jack Goldberg (R. 158, 160, 161); Louis W. Banach (R. 166); David Bieler (R. 181); Zach Johnson (R. 196, 200); Eula S. Ohler (R. 201, 205); and Joel Weiss (R. 222).

The petitioners also contended, by demurrer, motion for directed verdict, and exceptions to charges, that the

statutes under which they were tried are so vague, indefinite and insufficient as not to justify a judgment against them, upon the theory that "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid".

The O'Rourke indictment contains ten counts (R. 30, etc.) and he was convicted on all but the fifth and sixth counts. The conspiracy defendants were sentenced to a year and a day imprisonment and to a fine of $1,000 (R. 63-66); O'Rourke was sentenced to concurrent terms of imprisonment for eighteen months and to pay a fine of $1,000 (R. 67-68). The odd-numbered counts of the O'Rourke indictment respectively charge a violation of Title 49, U.S. Code 2, 10, whereas the language of the indictment imports that it is based upon Section 6, subparagraph 7, Title 49, U.S. Code. The even-numbered counts of the O'Rourke indictment allege violation of Title 49, U.S. Code 6, sub-section 7. From a strictly legal standpoint, both the odd- and even-numbered counts constitute, if they charge any offense, a violation of said Section 6, sub-section 7. This becomes important in the O'Rourke case, because under Section 10 of the Act, O'Rourke was only subject to a fine, and the court had no authority to impose a jail sentence because O'Rourke did not come within the provisions of Section 10, which covers "unlawful discriminations in rates, fares or charges". In the petition for re-hearing, filed in the appellate court, this matter was called to the attention of appellate court and is contained on pages 2 and 3 thereof.

THE STATUTES UPON WHICH INDICTMENTS WERE BASED, AND CO-RELATED STATUTES, ARE SET FORTH IN APPENDIX TO THIS BRIEF.

SPECIFICATIONS OF ERROR

Are ticket sellers of a railroad corporation involved in interstate commerce passenger transportation amenable under the provisions of the Interstate Commerce Act for accepting tips, gratuities or bribes from passengers in addition to the legal tariff rate when they hand over such legal tariff rate to their employer and simply retain the tips? This question is based upon the following assignments of error (R. 95) urged in the appellate court:

(a) overruling of demurrer; (b) denying motion for directed verdict; and (c) charging the jury.

ARGUMENT

The demurrers to the indictment as well as the motion for a directed verdict were argued upon two theories:

(a) That the Interstate Commerce Act, the aim of which was the prevention of discrimination by carriers, did not create any offense against other than carriers except where the carrier was the principal offender and the individuals aided and abetted; and

(b) That the Interstate Commerce Act did not create a crime covering the acts committed by the defendants in the acceptance of tips or gratuities, or bribes.

Under the theory denominated as (a), it was argued in the lower court that unless the railroad received the benefit of the overcharge, the ticket agent could not be prosecuted, because the agent in accepting the tips or

bribes was a trespasser, embezzler, or a violator of state law, and his offense did not come within the purview of the Interstate Commerce Act."

This question was passed upon by two district court judges in cases where the facts disclose that the money received by the agent was less than the amount of the legal tariff rate, and the money was embezzled by the agent. In the first of these cases, **U.S. v. Petersen**, 1 Fed. 2nd 1018 (Montana) decided October 6, 1924, opinion by District Judge Bourbon, it was held:

> "It follows that, unless there is a common carrier guilty as principal, the carrier's employees or other persons cannot be guilty as aiders, abettors, accomplices, or accessories, not even as offenders by the agency of an innocent principal; and that, because they are not of the class that alone can commit the offenses by the statutes denounced, viz. common carriers who wilfully discriminate, and those persons who aid or abet them therein. The fact that the defendant was 'employed by' the carrier is not enough; for, taking the statutes as a whole, it seems clear their intent is to include the employee only when 'acting' within the scope of his employment' and, thereby imposing equal guilt upon the carrier. This defendant, for the nonce abandoned his employment, acted without his employment, in trespass against his employer, and for his own benefit. His acts attach no criminality to the carrier, and, without it guilty as principal, he is not guilty, for reasons aforesaid."

The second case is that of **U.S. v. Estes**, 6 Fed. 2nd 902 (Illinois), opinion by District Judge Fitzhenry. This case was decided April 4, 1924, six months before the decision in the Petersen case. The opinion in the case states:

> "It is argued that, while the line of conduct charged in the indictment in this case might have amounted to fraud or graft, still it did not amount to a violation of Section 10".

The case involved the sale by Pullman conductors of tickets and Pullman accommodations at less than the legal rate. There is no doubt that all the money so received was retained by the agents and none was turned over to the railroad. District Judge Fitzhenry held in his opinion that the offense came within the terms of the Interstate Commerce Act.

However, neither of said cited cases is factually similar to the case at bar, where the railroad and the Pullman company received the lawful tariff rate and where the defendants retained only a tip, gratuity or, at the very worst, a bribe.

The Government relied upon and the appellate court cited with approval **U.S. v. Tozer**, 37 Fed. 637, where a demurrer to a similar indictment was overruled on the ground that:

> "When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary * * * either to allege or prove that the particular unlawful act complained of was done

under authority conferred by a principal or by its direction".

The appellate court states that the Tozer case was approved by Judge Taft in **Toledo v. Pennsylvania Railroad Co.**, 54 Fed. 730, and also cites the decision of the United States Supreme Court in **Union Pacific Railway Co. v. U. S.**, 313 U.S. 450, where it is stated that action by any person to bring about discrimination in respect to the transportation of property is made unlawful by the Elkins Act.

In the Tozer case, the defendant was an agent of the Missouri Pacific Railroad and as such he charged Haywood Grocery Company a greater rate for sugar shipments from Hannibal, Missouri to Halper, Kansas, than he charged the Chicago, Burlington & Quincy Railroad for similar service. Factually Tozer received the freight money and turned it over to the Missouri Pacific Railroad. Judge Thayer in his opinion states that Section 10 of Interstate Commerce Act renders any agent of a railroad company that is subject to the provisions of the Act amenable to the penalties set forth herein if he either alone or with any one person or corporation wilfully does any of the acts prohibited, and he further sets forth that it is unnecessary to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal or by its direction. This Tozer case later came on for trial, and is reported in 39 Fed. 369, and from the court's charges it appears that the railroad company, the carrier company, received the excess rate. Therefore the Tozer case as cited by our appellate court is not a precedent to be followed in the case at bar.

It is interesting to observe however that this Tozer case was appealed to the United States Circuit Court 152 Fed. 917 and that court, through Mr. Justice Brewer, reversed the judgment upon the following theory:

> "but, in order to constitute a crime, the act must be one which a body is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Day, 35 Fed. Rep. 866, 877, I had occasion to discuss this matter, and I quote therefrom as follows:
>
> 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what any jury will find to be a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainants criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary man can determine in advance what he may or what he may not do under it.'"

We cite the opinion of Mr. Justice Brewer because it accords with Ground 5 of the demurrer, to-wit: the statutes upon which the indictment is based and related

statutes covering transportation in inter-state commerce do not bring within the statutes the acts set forth in the indictment, and "laws which create crime ought to be so explicit that all men subject to their penalty may know what to avoid, and before a man can be punished his case must be plainly and unmistakably within the statute." p. 100.

Mr. Justice Brewer who wrote the opinion of the Circuit Court of Appeals in the last cited case, was commissioned an Associate Justice of the United States Supreme Court in December, 1889.

The Tozer case, as reversed by Judge Brewer, applies to the case at bar, in that the charge of the trial Judge, which is again repeated, submits to the jury the reasonableness or otherwise of the tips received, viz:

> "The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for service than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collec-

tion and receipt of greater compensation for services, than the rates specified in the tariffs filed with the Interstate Commerce Commission."

Our argument that the Interstate Commerce Act does not create a crime covering the acts committed by the defendants in the acceptance of tips, gratuities, or bribes is based upon the language used in the case of **U.S. v. Brewer**, 139 U.S. 278; 11 S. Ct. 538; 35 L. Ed. 190; wherein the court said:

> "It does not suffice that defendant's case may be within the mischief of the statute, for, not clearly within their letter, it is not within their intent. 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what [illegible] to avoid', and before a man can be punished, his case must be plainly and unmistakably within the statute'".

An examination of Shepard's Annotations discloses that the Tozer case is referred to in the following opinions of the United States Supreme Court: **Waters Pierce Oil Co. v. State of Texas**, 212 U.S. 109; 53 Law Ed. 417; 29 Sup. Ct. 226, wherein the court says:

> "Among others, Tozer v. U.S., 4 Inters. Comm. Rep. 245, 52 Fed. 917; is cited, in which the opinion was by Mr. Justice Brewer, then Judge of Circuit Court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."

"To the same effect in Chicago & N.W. R.R. v. Dey, 1 L.R.A., 744, 2 Inters. Comm. Rep. 335, 35 Fed. 866, also decided by Judge Brewer at Circuit, and also the case of Louisville & N.R. Co. v. Com. 99, Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S.W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate and in which it was held that the law was unconstitutional, because it rests with the jury to say whether a rate is reasonable and makes guilt depend not upon standards fixed by law but upon what a jury might think as to the reasonableness of the rate in controversy."

The court however pointed out that the statute does not give this broad power to the court or jury.

The next case is that of **Nash** v. **U.S.**, 229 U.S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 781. This case concerned a violation of the Sherman Anti-trust Act and was reversed by the United States Supreme Court. On Page 377, 229 U.S., the court said:

"and thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty'

and cited from the late Mr. Justice Brewer sitting in the Circuit Court, **Tozer v. U.S.** 1 Inters. Comm. Rep. 245, 52 Fed. 917, 919.

The next case is that of **U.S.A. v. Cohen Grocery Co.** 255 U.S. 81, Text 92; 65 L. Ed. Text 522; 41 Sup. Ct. Text 301. This case involved a violation of the Lever Act as re-enacted in 1919 wherein it was provided:

> "that it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries to conspire, combine, agree or arrange with any one person * * * to exact excessive prices for any necessaries".

The defendant demurred to the indictment and the lower court sustained the demurrer. The Supreme Court quoted the following language from an opinion previously expressed by the lower court in charging a jury, wherein the court said:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. Therefore, because the law is vague, indefinite and uncertain, and because it contains no immutable standard of guilt but leaves such standard to the variant powers of different courts and juries which will be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid and that the

demurrer offered by the defendant ought to be sustained".

The Supreme Court then recites the portion of the Lever Act above quoted and as to the certainty or uncertainty of the text, constituting a fixing by Congress of an ascertainable standard of guilt adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. The court said:

> "That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."

The Supreme Court, after holding that the lower court acted correctly in sustaining the demurrer, said:

> "And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution. That it results from the consideration

> which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question"

and thereupon, the United States Supreme Court, after citing other decisions, cites with approval the decision in **Tozer v. U.S. Inters. Comm.** Rep. 245, 919, 920.

The next case is **Cline v. Frink Dairy Co.**, 274 U.S. Text 455, 71 L. Ed. Text 1151, 47 Sup. Ct. Text 684. This case involved an appeal by defendant from the decree of the District Court of Colorado enjoining proceedings to enforce an anti-trust act, and was reversed in part. Mr. Justice Taft in the course of the opinion, cited the opinion of the Supreme Court in the Cohen Case, supra, and the court refers, with approval, to a number of cases including **Tozer v. U.S.**, 52 Fed. 917, 919, 920. The court in the opinion said:

> "We are now considering a case of state legislation and threatened prosecutions in the state court where only the 14th Amendment applies, but that requires that there should be due process of law and this certainly imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required".

CONSTRUCTION OF INTERSTATE COMMERCE ACT

We contend that the Interstate Commerce Act lacks any provision upon which an indictment could be based

in respect to the matters involved in the present controversy. Had the Congress in drafting the Interstate Commerce Act, defined offenses relating to passenger transportation with the same definiteness, particularity, and cosequent penalties, as it did concerning property transportation, there would be no need to burden this Court with any argument. However, when it came to the attention of the Interstate Commerce Commission that employees of railroad companies were accepting gifts, gratuities and bribes for the purpose of influencing the decision of the employees with respect to the supply, distribution or movement of cars or other vehicles or vessels used IN THE TRANSPORTATION OF PROPERTY (emphasis supplied), that body solicited the Congress to enact legislation to curb such evil, and thereupon Sub-section 17 (a), of Section 1, of Title 49 was enacted, which section is set forth on Page xii of the Appendix.

In 1889, when it came to the attention of the Interstate Commerce Commission and the Congress that shippers were paying money or other thing of value to induce carriers or agents to discriminate in regard to SHIPPING OF PROPERTY, the Congress enacted what is now Section 10, Paragraph 4 which is contained in the Appendix on Page viii, wherein any person who, by the payment of money or other thing of value, solicitation, or otherwise, induces a common carrier or its agents to discriminate unjustly in favor of one part as against any other consignor in the transportation of property, shall be subject to a fine or imprisonment.

In 1889, in regard to false billing as now contained in Paragraph 2 of Section 10, the Congress enacted:

> "Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing . . . ."

shall permit property to be transported at less than the regular rates shall be guilty of a misdemeanor.

The last two amendments to the Interstate Commerce Act were made within two years after the enactment of the original Act, but the amendments solely dealt with the transportation of property.

There is now pending before the Committee on Interstate and Foreign Commerce, H.R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act. That proposed statute is on Page xiv of the Appendix.

JUDGMENT OF IMPRISONMENT AS TO O'ROURKE

Section 2 of the Interstate Commerce Act is set forth in Appendix Page iii. It punishes a common carrier who directly or indirectly by any special rate, rebate, drawback or other device, charges, demands, collects or receives from any person a greater or less compensation for services in the transportation of passengers or property, than it charges other persons for doing a like and contemporaneous service. The section emphatically states:

"Such common carrier shall be deemed guilty of

unjust discrimination, which is prohibited and declared to be unlawful".

A reading of the O'Rourke indictment is convincing to the effect that he was charged with receiving a larger sum of money for transportation of passengers than was set forth in the tariff schedule (sub-section 1 of Section 6). O'Rourke received a penetentiary sentence and under the first paragraph of Section 10 of the Interstate Commerce Act, it is contended that his acts, if violative of the statute, rendered him guilty of a misdemeanor, and subject to a fine of not more than $5,000. O'Rourke did not come within the proviso of Section 10, which reads:

> "Provided, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penetentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The only relevant portion of the Interstate Commerce Act which uses language similar to the language contained in the above proviso, is Section 2 where it is set forth that the commission of the acts therein described constitute "unjust discrimination".

In the Estes case, supra, the court stated that the defendants were guilty of a misdemeanor, and the records

of the United States District Court disclose that a small fine was imposed. This leads to the conclusion that the trial court in that case, passed its sentence upon a construction of the law dealing solely with persons selling tickets at a greater or less price than set forth in the tariff schedule.

It is respectfully urged that the judgment of the appellate and trial court should be reversed.

Respectfully,

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APPENDIX

STATUTES CITED AND INVOLVED
NATIONAL TRANSPORTATION POLICY

(49 U. S. Code Sec. 1, et seq.)

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act by inserting before part I thereof (chapter 1 of this title) a provision entitled "National Transportation Policy" which reads in part:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8 and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices, etc."

And in subdivision (4) of Section 1, the following duties are set forth:

> "(4) Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and

to establish reasonable through routes with other such carriers; and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto."

AND

"(5) Just and reasonable charges required; classification of messages, and rates; exchange of services.

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The pleader charges in the conspiracy indictment that the offending acts were committed contrary to

a. Sec. 1 of the Interstate Commerce Act

b. Sec. 2 of the Interstate Commerce Act

c. Sec. 3 of the Interstate Commerce Act

d. Sec. 4 of the Interstate Commerce Act.

Sec. 1, 5), (a), is quoted above, and the remaining sections involved are:

Section 2:

"Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, **charge, demand, collect, or receive** from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, ch. 104, part 1, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602 (b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.) (Underscoring supplied.)

Section 3:

"Preferences; interchange of traffic; terminal facilities.

(1) Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; PROVIDED, HOWEVER, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 6:

"Schedules and statements of rates, etc., joint rail and water transportation—(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the

route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

The charge in the conspiracy indictment wherein it alleges a violation of Sec. 6, must particularly pertain to

Sub-section 7 of Section 6 which provides:

"Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The O'Rourke indictment (odd numbered counts) are based on alleged violations of Title 49, U.S.C. Sec. 2, and Sec. 10:

Sec. 2 is quoted heretofore and Section 10 follows:

"Violations of regulations by carrier; discrimina-

tion; penalties—(1) Violation by carrier or officer; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; PROVIDED, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore

provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The even numbered counts in O'Rourke indictment cover violation of Sub-Section 7 of Section 6, which is heretofore quoted.

We have quoted the first paragraph of Section 10 but it has three additional sub-sections, which refer specifically to false billing as to freight shipments; obtaining lower rates by false billing or false claim; and inducing unjust discrimination as against other consignors or consignees, solely in regard to freight, and the latter (sub-section 4 of Section 10) reads:

"Inducing unjust discrimination; penalty; liability for damages.

If any such person or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon convic-

tion thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom." Feb. 4, 1887, ch. 104, part I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309 § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543."

Because reference is made in the argument to certain sections of Chap. 2, the following is quoted therefrom:

"Chapter 2. — LEGISLATION SUPPLEMENTARY TO "INTERSTATE COMMERCE ACT"

§ 11. Liability of corporation carriers and agents; offenses and penalties. (1) Liability of corporation common carriers; offenses; penalties, jurisdiction.

Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any re-

ceiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall,

be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: **Provided,** That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) Liabilities for acts of agents; departure from published rates.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every

case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of Chap. 1 of this title, or participates in any rate so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under Sec. 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section."

Title 49, Sec. 1, Sub-section (17), (b), (enacted in 1940), reads:

"It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced

thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property."

In regard to transportation of property, Sub-section 4, of Section 10, is as follows:

"Inducing unjust discrimination; penalty; liability for damages.

If any such person or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common

carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, ch. 104, part I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309, § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543)."

The following excerpt is from H.R. 3717:

IN THE HOUSE OF REPRESENTATIVES
July 10, 1945

Mr. Lea introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce:

A BILL

To amend the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 17 of section 1 of the Interstate Commerce Act, as amended, be amended by adding after subparagraph (b) thereof the following:

"(c) It shall be unlawful for any person acting for or employed by any common carrier sub-

ject to this Act to demand, solicit, or receive, directly or indirectly, any bribe, or any money, property, thing of value or gratuity, or promise thereof, in any form whatsoever, with respect to the furnishing, procurement, reservation, sale, or resale, of any ticket covering any passenger transportation or the use of any passenger accommodation. A payment of the lawful charges of a common carrier subject to this Act to a person acting for or employed by such common carrier shall not constitute a violation of this subparagraph. Any person who violates the provisions of this subparagraph shall be punished by a fine of not more than $1,000 or imprisoned for a term of not more than one year, or both.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, AND TERENCE P. O'ROURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 272–276) is reported at 150 F. 2d 82. The opinion of the district court overruling petitioners' demurrers to the indictments appears at pages 12–17 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1945 (R. 277), and a petition for rehearing (R. 278–287) was denied July 18, 1945 (R. 289). The petition for a writ of

certiorari was filed August 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Are employees of a corporate common carrier subject to the provisions of the Interstate Commerce Act amenable to punishment under Section 10 of the Act for collecting and receiving from purchasers of transportation accommodations more than the rates prescribed by the established tariffs and appropriating the difference to themselves?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., and of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, are set forth in the Appendix, *infra*, pages 10–13.

STATEMENT

Petitioners Howitt, Lee, and Dewhurst were indicted in the District Court for the Southern District of Florida for conspiracy to violate the Interstate Commerce Act. The indictment charges that Howitt and Dewhurst were employees of the Florida East Coast Railway Company, acting for the carrier in the sale of railroad and

Pullman tickets, and that Lee was employed by the same carrier as a diagram clerk. It is further alleged that the Florida East Coast Railway Company, the connecting carriers, and the Pullman Company are common carriers subject to the provisions of the Interstate Commerce Act, and that lawful rates for passenger accommodations had been published and filed by the carriers with the Interstate Commerce Commission. It is charged that petitioners, while acting as such employees, conspired to collect and receive unjust and unreasonable charges for passenger transportation, in violation of Section 1 (5) of the Act; to collect and receive from certain persons greater compensation for service in the transportation of passengers than would be collected from other persons for similar service, in violation of Section 2; to give undue preference and advantage to particular persons and subject others to undue prejudice and disadvantage, in violation of Section 3 (1); and to collect and receive greater and different compensation for transportation of passengers than specified in tariff schedules filed with the Interstate Commerce Commission, in violation of Section 6 (7). (R. 1–8.)

Petitioner O'Rourke, also employed by the same carrier as a ticket seller, was charged in a separate indictment with committing substantive offenses of the same nature as are involved in the conspiracy indictment against the other petitioners (R. 30–49).

Petitioners' demurrers to the indictments (R. 9–11, 50–53) and their motion for directed verdict (R. 239–241)[1] on the ground that their conduct was not within the purview of the Interstate Commerce Act because it was not alleged or proved that the carrier itself was a principal offender, were overruled by the district court (R. 12–17, 55, 241).

The evidence in the conspiracy case disclosed that during the winter of 1943 great difficulty was encountered by applicants for railroad transportation at Miami, Florida, in obtaining accommodations (R. 125, 159). Certain of the hotels employed persons whose duty it was to procure accommodations for their guests (R. 124, 139, 153, 158, 166, 195). Arrangements were made between the hotel employees and petitioners Howitt, Lee, and Dewhurst to secure such accommodations by payment to petitioners of sums in excess of the regular fares, either by dividing moneys received by the hotel employees from the guests (R. 125, 126, 127, 128, 134, 147, 153, 155, 169, 231, 236), or by the hotel employees paying the excess amounts (R. 127, 128, 130, 131, 133, 134, 141, 153, 155, 156, 157, 159, 161, 166), or by the passenger making the payment (R. 133, 142, 144). There was testimony to the effect that the excess payments were not

[1] The cases were consolidated for trial upon petitioners' motion (R. 100).

gratuities to petitioners, but a condition precedent to securing a ticket (R. 136, 148, 154).

The evidence as to petitioner O'Rourke was in similar vein and showed that he sold railroad accommodations at prices in excess of the published tariffs (R. 183, 184, 197, 206, 207, 216, 217, 221, 232).

Petitioners were each convicted after a jury trial (R. 61, 62). Petitioners Hewitt, Lee, and Dewhurst were each sentenced to imprisonment for a year and a day and to pay a fine of $1,000 (R. 63–66); and petitioner O'Rourke was sentenced to concurrent terms of imprisonment for 18 months on the eight counts on which he was convicted and, generally, to pay a fine of $1,000 (R. 67–68). The convictions were affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 277).

ARGUMENT

Petitioners contend here (Pet. 2, 6–7), as they did in the courts below, that the prohibitions of the Interstate Commerce Act here involved apply only to agents or employees who act as aiders and abettors of a guilty carrier as a principal, and that since it was neither alleged nor proved that their employer directed or participated in their activities they are not punishable under the Act. We submit that this contention cannot prevail.

The sanctions of Section 10 (*infra*, p. 12) in terms clearly apply to employees of a corporate carrier, who act without the participation or

connivance of the carrier. It punishes activities made unlawful by Sections 1 (5) (a), 2, 3 (1), and 6 (7) when performed by a common carrier or, if the carrier is a corporation, by any director or officer thereof, and also "any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party," shall wilfully do an act prohibited or omit to do an act required to be done.

The question was first determined adversely to petitioner's contention in *United States* v. *Tozer*, 37 Fed. 635 (E. D. Mo.), a prosecution against an agent of a carrier for charging a shipper of sugar at a greater rate than was charged another shipper. The court rejected the contention that the indictment was bad because it failed to allege that the defendant had authority to do the acts charged, holding (p. 639) that "when an agent of a railroad is prosecuted under the statute [Section 10] for an unlawful act, it is not necessary * * * either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction." The *Tozer* decision was expressly approved by the late Chief Justice Taft, then Circuit Judge, in *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio), affirmed, *In re Lennon*, 150 U. S. 393. *United States* v. *Estes*, 6 F. 2d 902 (N. D.

Ill.), is to the same effect. Cf. *Union Pacific R. Co.* v. *U. S.*, 313 U. S. 450, 462–463.

United States v. *Peterson*, 1 F. 2d 1018 (D. Mont.), is the only decision to the contrary. In sustaining a demurrer to an indictment charging that the defendant, "while and as" agent for a carrier, sold embezzled tickets for less than the established rate, the court relied upon the provision of the Elkins Act imputing to the carrier any "act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, * * * acting within the scope of his employment" (49 U. S. C. 41 (2), Appendix, *infra*, p. 13), and held that by virtue of this provision persons other than the carrier

---

This was a prosecution for charging less than the established rate for Pullman accommodations. In overruling a demurrer to the indictment the court stated (p. 905):

"The contention that the words 'acting for or employed by,' in connection with part of section 10, involved the charge of collusion between the carrier and the one acting for the carrier, cannot be sustained. To construe section 10 so narrowly would be to open the floodgates to a line of violations of the Interstate Commerce Law which would be exceedingly detrimental to the public interest. It was undoubtedly the intention of Congress to put an end to discriminations against certain persons and in favor of others using the facilities of a carrier. It is argued that, while the line of conduct charged in the indictments in these cases might have amounted to fraud or graft, still it did not amount to a violation of section 10. It was undoubtedly the purpose of Congress to hold for criminal misconduct, not only the carrier, but any officer, director, agent, or other person acting for or employed by the carrier who might be in control of the facilities for rendering service, or the service, which the passenger desired to use."

itself may be punished only when they act as aiders and abettors of the carrier; that "taking the statutes as a whole, it seems clear their intent is to include the employee only when 'acting within the scope of his employment' and thereby imposing equal guilt upon the carrier" (p. 1019). The error of this decision lies, we think, in construing this section of the Elkins Act as limiting the application of Section 10 of the Interstate Commerce Act to employees acting within the authority conferred upon them. It is clear, however, that the Elkins Act has no such effect and that its sole purpose in this regard was to impute to carriers the acts or omissions of its agents and employees.

There is no merit in petitioner's further assertion that the provisions of the Interstate Commerce Act here involved "are so vague, indefinite and insufficient as not to cover the facts" (Pet. 7). While it may be that the specific transactions involved in these cases were not contemplated when the statute was enacted, nevertheless "while a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 339–340. The substantive provisions of the Interstate Commerce Act prohibiting the practices which petitioners engaged in clearly establish ascertainable standards of guilt in respect of the lawful charges which may be made for transportation services. The schedule of rates filed by

the carrier with the Interstate Commerce Commission, as required by Section 6 (7), provides the criterion in determining whether a given charge is unjust and unreasonable within the meaning of Section 1 (5) (*Kinnavey* v. *Terminal Ry. Assn. of St. Louis*, 81 Fed. 802 (C. C. E. D. Mo.), cited with approval in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) or constitutes an undue or unreasonable preference prohibited by Section 3 (1). *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735 (C. C. A. 6), certiorari denied, 234 U. S. 757. The remaining substantive provisions involved, Sections 2 and 6 (7), are explicit in prohibiting discrimination between persons in respect of charges for transportation services and charges in excess of those specified in the tariffs filed with the Interstate Commerce Commission.

CONCLUSION

The decision below is clearly correct and no such conflict of decisions exists as to call for further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
Attorney.
IRVIN GOLDSTEIN,
Special Attorney.

SEPTEMBER 1945.

APPENDIX

The Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., provides:

Section 1. (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 2. If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or ad-

vantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 10. (1) Any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, provides in part:

Section 1. Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. * * *

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

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No. 554

In the Supreme Court of the United States

OCTOBER TERM, 1945

STANLEY HOSTER, ZIGMA PEET LEE, JAMES DAWSON, AND THOMAS F. O'ROURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 354

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v.

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JURISDICTION

The judgment of the circuit court of appeals was entered on June 14, 1945 (R. 277), and a petition for rehearing (R. 278–287) was denied on July 18, 1945 (R. 289). The petition for a writ of

certiorari was filed on August 21, 1945, and was granted on October 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether employees of a common carrier who use the power of their positions to discriminate among passengers by collecting sums in excess of established rates, appropriating the excess for themselves, are punishable under Section 10 (1) of the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, and of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Petitioners Howitt, Lee, and Dewhurst were indicted in the District Court for the Southern District of Florida for conspiracy (18 U. S. C. 88) to violate the Interstate Commerce Act in that, as employees of the Florida East Coast Railway Company, an interstate carrier subject to the

Interstate Commerce Act; they conspired to collect and receive unjust and unreasonable charges for passenger transportation, in violation of Section 1 (5) (a) of the Act; to collect and receive from certain persons greater compensation for service in the transportation of passengers than would be collected from other persons for similar service, in violation of Section 2; to give undue preference and advantage to particular persons and subject others to undue prejudice and disadvantage, in violation of Section 3 (1); and to collect and receive greater and different compensation for transportation of passengers than specified in tariff schedules filed with the Interstate Commerce Commission, in violation of Section 6 (7) (R. 1–8). Such action is made punishable by Section 10 (1) of the Act (Appendix, *infra*, pp. 20–21). Howitt and Dewhurst sold tickets for the railway company, and Lee was a diagram clerk in charge of allocating Pullman or reserved coach seat reservations (R. 105, 126, 158, 171).

Petitioner O'Rourke, also employed by the same carrier as a ticket seller, was charged in a separate indictment with committing substantive offenses of the same nature as are involved in the conspiracy indictment against the other petitioners (R. 30–49).

Petitioners' demurrers to the indictments (R. 9–11, 50–53) and their motion for a directed

verdict (R. 239–241)[1] on the ground that their conduct was not within the purview of the Interstate Commerce Act because it was not alleged or proved that the carrier itself was a principal offender, were overruled by the district court (R. 12–17, 55, 241). Petitioners also excepted to the district court's charges (R. 257).

The evidence in the conspiracy case disclosed that during the winter of 1943 great difficulty was encountered by applicants for railroad transportation at Miami, Florida, in obtaining accommodations (R. 125, 139). Certain of the hotels employed persons whose duty it was to procure railroad accommodations for their guests (R. 124, 139, 153, 158, 166, 195). Arrangements were made between the hotel employees and petitioners Howitt, Lee, and Dewhurst to secure such accommodations by payment to petitioners of sums in excess of the regular fares, by dividing moneys received by the hotel employees from the guests (R. 125, 126, 127, 128, 134, 147, 153, 155, 169, 231, 236), or by the hotel employees' paying the excess amounts (R. 127, 128, 130, 131, 133, 134, 141, 153, 155, 156, 157, 159, 161, 166), or by having the passenger making the payment (R. 133, 142, 144). The excess payments were a condition precedent to securing a ticket (R. 136, 148, 154, 156), and passengers were told that they could not get reservations without making excess payments (R. 169, 230, 235, 236–237).

[1] The cases were consolidated for trial upon petitioners' motion (R. 100).

The evidence as to petitioner O'Rourke was in similar vein and showed that, while acting as a ticket seller, he demanded and collected prices in excess of the published tariffs for railroad accommodations (R. 183–184, 197, 216–217, 220–221).

Petitioners were each convicted after a jury trial (R. 61, 62). Petitioners Howitt, Lee, and Dewhurst were each sentenced to imprisonment for a year and a day and to pay a fine of $1,000 (R. 63–66), and petitioner O'Rourke was sentenced to concurrent terms of imprisonment for 18 months on the eight counts on which he was convicted and, generally, to pay a fine of $1,000 (R. 67–68). The convictions were affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 277).

SUMMARY OF ARGUMENT

Sections 1 (5), (a), 2, 3 (1), and 6 (7) of the Interstate Commerce Act prohibit carriers from unlawfully discriminating among passengers and shippers. Section 10 (1) provides for the punishment of an individual employee of a corporate carrier who commits or causes the commission of an act prohibited by these Sections. While we do

[2] Petitioner O'Rourke alleges (Br. 7, 21–22) that he was charged only with violating Section 6 (7) rather than Section 2 and hence that the proviso of Section 10 (1), imposing a prison term for unlawful discriminations (sec. 2), was inapplicable. (See Appendix, *infra*, pp. 19, 20–21.) However, the indictment (R. 30–49) also charged violations of Section 2 of the Act, which is the unlawful discrimination section (Appendix, *infra*, p. 19), and paraphrased its language (R. 32, 35, 36, 39, 40, 43, 47).

not deny that an act for which liability is sought to be imposed under Section 10 (1) must be in a broad sense action by a carrier, we do not think that the individual responsibility of a railroad employee who exercises the function conferred upon him by the railroad in dealing with the public is to be measured by the considerations which affect corporate responsibility for the acts of its employee. Petitioners caused the railroad which employed them to discriminate in favor of persons who paid more than the established rate. However innocent the railroad as an entity may have been, the fact remains that persons seeking transportation could get accommodations from that railroad only by payment of a greater fee than other passengers paid for the same service. There was thus discrimination by a carrier prohibited by Sections 1 (5) (a), 2, 3 (1), and 6 (7), which was caused by petitioners, employees of a corporate carrier, one of the classes mentioned in Section 10 (1).

The construction of Section 10 (1) as covering employees of a railroad who use their authority to discriminate among passengers is in accord with the fundamental purpose of the Interstate Commerce Act to bar discrimination in any form, as well as the purpose of Section 10 (1) to punish the individual wrongdoer rather than the corporation. The statute, though penal, should be construed in relation to the evils which it was designed to eliminate.

ARGUMENT

SINCE PETITIONERS, AS EMPLOYEES OF THE RAILROAD, IN EXERCISING THE FUNCTIONS CONFERRED UPON THEM, CAUSED THE RAILROAD TO DISCRIMINATE IN FAVOR OF PASSENGERS WHO PAID MORE THAN THE ESTABLISHED RATES, PETITIONERS WERE PROPERLY CONVICTED OF AN OFFENSE UNDER SECTION 10 (1) OF THE INTERSTATE COMMERCE ACT

The evidence in this case establishes that persons desiring transportation from Florida northward could get accommodations only if they paid to petitioners sums of money over and above the established, published rate, and that persons who did pay this extra compensation received a preference over others in a similar position. It is clear that such action by the railroad itself would have been unlawful under Sections 1 (5) (a), 2, 3 (1), and 6 (7) of the Interstate Commerce Act (Appendix, *infra*, pp. 19–20), which deal with unjust practices, and that petitioners, as persons employed by the railroad who effectuated such policy, would have been subject to punishment under Section 10 (1) of that Act (Appendix, *infra*, pp. 20–21). The narrow question here presented is whether the fact that petitioners used their positions with the railroad to perform such acts, not for the profit of the railroad, but for their own personal profit, absolves them from liability under Section 10 (1).[3]

[3] For the purposes of this case, it is unnecessary to differentiate between the substantive offenses of which O'Rourke was convicted and the conspiracy charged against the other petitioners. If the consummated acts were crimes, it was, of course, unlawful to conspire to perform them.

Petitioners contend (Br. 8, 9) that since Sections 2, 3 (1) and 6 (7) of the Interstate Commerce Act by their terms prohibit certain action by carriers as such,[4] "a person acting for or employed by" a corporate carrier cannot commit a violation of these Sections, and hence cannot be convicted under Section 10 (1), unless his acts would render the carrier itself criminally liable. They fortify their contention by reference to Section 1 of the Elkins Act (Appendix, *infra*, pp. 21–22), which, in providing for punishment of the corporation, specifies that the act of an employee "within the scope of his employment" shall also be deemed to be the act of the carrier.[5]

On its face, however, Section 10 (1) discloses a purpose to prohibit employees of a corporate carrier from using their positions to effectuate unlawful acts, whether or not the act may also be attributed to the carrier under the later Elkins

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[4] We concede that Section 1 (5) (a) also concerns action by carriers.

[5] Corporations are not liable under Section 10 (1), which was enacted in 1887. *In re Peasley*, 44 Fed. 271, 275 (C. C. N. D. Ill.); *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio). In this regard, Section 1 of the Elkins Act of 1903 was designed to impute to a corporate carrier the acts or omissions of an employee acting within the scope of his employment. H. Rep. No. 3765, 57th Cong., 2d sess., p. 1. The Florida East Coast Railway is of course not liable, for petitioners were acting adversely to their employers. Cf. *American Security Company* v. *Pauly*, 170 U. S. 133, 156–157; *Scullin Steel Co.* v. *North American Co.*, 255 Fed. 945, 948 (C. C. A. 8).

Act. When Section 10 (1) was originally passed as part of the Interstate Commerce Act, no attempt was made to reach the corporation as such, but punishment was imposed only on the individual who performs the prohibited act. Section 10 (1) provides for the punishment of persons who not only do any of the acts made unlawful by the other Sections, but who cause, aid, abet, suffer, or permit the commission of such act. Moreover, it is to be noted that Section 10 prohibits conduct by a "person acting for or employed by" a carrier corporation and does not contain the additional phrase inserted in the Elkins Act that the carrier should be liable for the acts of such a person "acting within the scope of his employment." The very absence of this phrase from Section 10 (1) shows, we think, that the responsibility of the persons enumerated therein was not limited by the considerations which effect imputation of an agent's act to his corporate principal.

Concededly, the acts for which punishment may be imposed under Section 10 (1) must relate to the functions of a carrier and the unlawful acts must in a broad sense be action by a carrier. But we do not think that the personal responsibility of an employee of a carrier in relation to his dealings with the public is to be measured in terms of the ability to hold the carrier criminally responsible for the acts of a dishonest employee. In our view, it is immaterial that the railroad, as

such, may have acted innocently in the matter, and that petitioners' interest in the transactions, adverse to that of their employer, may preclude imputation of their acts to the railroad. The fact remains that persons seeking transportation from the railroad could procure accommodations from that railroad only upon payment of a greater fee than other passengers paid for the same service. All the tickets or reservations involved in this case were purchased directly from the railroad through petitioners, persons clothed by the railroad with authority to sell. Petitioners were enabled to demand the excessive rates only because they had authority to exercise the function of the railroad. Thus, irrespective of whether petitioners' acts may be attributed to the railroad for the purpose of imposing liability upon the corporation, their action was in a broad sense action by the railroad prohibited by the Interstate Commerce Act.* Petitioners, as employees of the railroad, thus caused the railroad to discriminate in favor of persons who paid more than the established rate. Hence, their conduct falls within the literal terms of Section 10 (1), and they may properly be held personally liable.

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*We think that the acts performed by petitioners were actions by a carrier in much the same sense that action by a state official who abuses the power of his office is, nevertheless, state action. See *Screws* v. *United States*, 325 U. S. 91, 110.

That a person may cause a crime to be committed through an innocent instrumentality is a well established principle of criminal law. This Court held in *United States* v. *Giles*, 300 U. S. 41, that a bank employee committed the crime of making false entries in the books of a bank by withholding deposit slips and thus causing false entries to be made by an innocent clerk. In mail fraud cases, a defendant may effect the use of the mails by depositing an out-of-town check in a bank which innocently mails it for collection. *Kann* v. *United States*, 323 U. S. 88, 93. A physician can commit the offense of unlawfully selling narcotics by issuing a prescription therefor, although the crime is not completed until a pharmacist, who may be innocent, actually fills the prescription. *United States* v. *Abdallah*, 149 F. 2d 219, 222 (C. C. A. 2), certiorari denied, October 8, 1945, No. 130, this Term. The causation in this case is different in form but not in essence. Insofar as the general public was concerned, the railroad as an entity, whether innocent or not, did discriminate among passengers, just as the innocent clerk in the *Giles* case made a false entry. Since such action was the direct, anticipated result of petitioners' deliberated conduct, petitioners caused the railroad to violate Sections 1 (5) (a), 2, 3 (1), and 6 (7) of the Act, and thus committed an offense under Section 10 (1).

The construction of Section 10 (1) to cover em-

ployees of a corporate carrier who use the authority conferred upon them to discriminate among passengers is in accord with the fundamental purpose of the Interstate Commerce Act. As this Court has frequently pointed out, "* * * it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." *Mitchell* v. *United States*, 313 U. S. 80, 94–95, and cases cited. As far as the general public is concerned, discrimination is just as much an evil when performed by railroad employees for their own profit as when performed by such employees for the profit of the railroad. In either case, the net result is favoritism and inequality. Furthermore, Congress, when it enacted Section 10 (1), was particularly interested in reaching the individual who perpetrated acts of discrimination rather than the corporation, to the extent that it did not impose liability on the corporation until the enactment of the Elkins Act sixteen years later. This intention, manifest from the face of Section 10 (1), is made abundantly clear by such legislative history as there is relating directly to that Section. Senator Cullom, Chairman of the Interstate Commerce Committee, explained Section 7 of the Sen-

ate bill (the equivalent of the present Section 10 (1)) as follows: "The purpose is to make the person responsible for the violation of the law subject to the penalty, and it is therefore provided that if the carrier is a corporation the officer, agent, or person guilty of any violation of the act shall be personally liable for the fine imposed." 17 Cong. Rec. 3473. In the House, Congressman O'Ferrall, a member of the Interstate Commerce Committee, explained the penal provisions as opening the courts to punish "the individual official or employee who willfully violates the law, aids or abets in its violation, or suffers it to be violated." 17 Cong. Rec. 7295. We submit that this emphasis on the individual wrongdoer, particularly when considered in relation to the underlying purpose of the statute to eliminate, as far as possible, all forms of discrimination, supports the view that Section 10 (1) was designed to punish anyone who used his position in a railroad corporation to effectuate acts of discrimination.

Most of the decisions in which this question has been presented have held that an employee of a railroad may be criminally liable under Section 10 (1) even though he was not acting in the interests of the railroad. In *United States* v. *Tozer*, 37 Fed. 635, 639 (E. D. Mo.), involving a prosecution against the agent of a carrier for unjust discrimination in fixing freight rates, the court rejected a contention that the indictment was defec-

tive for failure to allege that defendant had authority to perform the acts charged. The court there stated: "When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary, in my opinion, either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the act, and that the wrong was committed under color of his office or agency." This decision was expressly approved by the late Chief Justice Taft, then Circuit Judge, in *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio). In *United States* v. *Estes*, 6 F. 2d 902, 905 (N. D. Ill.), the court overruled a demurrer to an indictment charging an employee of the Pullman company with violations of Section 10 (1) for charging less than the established rate for pullman accommodations. The court there stated:

> The contention that the words 'acting for or employed by,' in connection with part of section 10, involved the charge of collusion between the carrier and the one acting for the carrier, cannot be sustained. To construe section 10 so narrowly would be to open the floodgates to a line of violations of the Interstate Commerce Law which would be exceedingly detrimental to the public interest. It was undoubtedly the intention of

> Congress to put an end to discriminations against certain persons and in favor of others using the facilities of a carrier. . It is argued that, while the line of conduct charged in the indictments in these cases might have amounted to fraud or graft, still it did not amount to a violation of section 10. It was undoubtedly the purpose of Congress to hold for criminal misconduct, not only the carrier, but any officer, director, agent, or other person acting for or employed by the carrier who might be in control of the facilities for rendering service, or the service, which the passenger desired to use.[7]

The same holding is, we think, implicit in the decision of this Court in *Illinois Central Railroad Co.* v. *Messina*, 240 U. S. 395, in which one who accepted a free ride on the tender of a locomotive by permission of the engineer was held to have violated the prohibition in Section 1 (7) of the Act against the granting of free transportation by a carrier and the use of "such, * * * free transportation." It is to be noted that Mr. Justice Hughes dissented on the ground that the

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[7] The contrary decision in *United States* v. *Peterson*, 1 F. 2d 1018 (D. Mont.) is based on the theory that an employee must be acting within the scope of his employment in order to be liable under Section 10 (1). We think this decision mistakenly assumes that there can be action by a carrier only if the acts of an employee can also be a basis for holding the carrier criminally liable.

engineer had no authority to grant free transportation on behalf of the carrier.

There is no merit in petitioners' assertion that the provisions of the Interstate Commerce Act here involved "are so vague, indefinite and insufficient as not to cover the facts" (Br. 3, 7, 12–18). The substantive provisions of the Interstate Commerce Act prohibiting the practices which petitioners engaged in clearly establish ascertainable standards of guilt in respect of the lawful charges which may be made for transportation services. The schedule of rates filed by the carrier with the Interstate Commerce Commission, as required by Section 6 (7), provides the criterion in determining whether a given charge is unjust and unreasonable within the meaning of Section 1 (5) (*Kinnavey* v. *Terminal Ry. Assn. of St. Louis*, 81 Fed. 802 (C. C. E. D. Mo.), cited with approval in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) or constitutes an undue or unreasonable preference prohibited by Section 3 (1). *Hocking Valley Ry. Co.* v. *United States*, 219 Fed. 735 (C. C. A. 6), certiorari denied, 234 U. S. 757. The remaining substantive provisions involved, Sections 2 and 6 (7), are explicit in prohibiting discrimination between persons in respect of charges for transportation services and charges in excess of those specified in the tariffs filed with the Interstate Commerce Commission.

The penal Sections of the Interstate Commerce Act are merely a means of effectuating the remedial policy of the statute and should be construed in relation to the evils which the statute was designed to eliminate. See *United States* v. *Dotterweich*, 320 U. S. 277, 283; *United States* v. *Gaskin*, 320 U. S. 527, 530; *United States* v. *Stowell*, 133 U. S. 1, 12. The rule of strict construction does not require that the statute "be strained and distorted in order to exclude conduct clearly intended to be within its scope." *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170. It is of no significance that Congress may not have contemplated the specific type of violation of which petitioners were found guilty.* As Mr. Justice Holmes said in *Illinois Central R. R.* v. *Messina*, 240 U. S. 395, 396–397, "No doubt the enactment had somewhat more formal uses especially in view, but we see no reason for limiting the prohibition to them." See also *Browder* v. *United States*, 312 U. S. 335, 339–340. We submit that petitioners' conduct flouted the fundamental purpose of the

*As a measure of caution, H. R. 3747 (Appendix to petitioners' brief XIV–XV; see also Br. 2, 20) was introduced in the House of Representatives after petitioners filed their petition for rehearing (R. 278–287) in the court below. This bill is still pending before the Committee on Interstate and Foreign Commerce, doubtless awaiting the outcome of this case.

statute and violated its literal terms. The fact that, in addition, petitioners were disloyal to their employer, should not absolve them from liability for violation of this statute.

CONCLUSION

The judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1945.

APPENDIX

The Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., provides:

Section 1. (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 2. If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company,

firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 10. (1) Any common carrier subject to the provisions of this part, or, when-

ever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, provides in part:

Section 1. Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. * * *

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

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IN THE

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No. 354

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vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, APPEARING AS AMICUS CURIAE.

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NATURE OF THE CASE

This case arises out of criminal indictments wherein the petitioners were accused of violating certain provisions of the Interstate Commerce Act. They were charged with having exacted fees in exchange for the securing of coach seat and sleeping car reservations for persons desiring to leave the City of Miami, Florida. The trial resulted in a judgment of conviction. An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment was affirmed. As we understand it, the petition for *certiorari* in this Court is predicated on the

legal proposition that the sections of the Interstate Commerce Act relied upon by the United States to support a conviction are directed to carriers and persons acting in their behalf, and not to persons, like the petitioners, acting in their own independent interest.

ISSUE HERE CONSIDERED

We are not so much concerned with a consideration of the principal issue in the case, which has been fully briefed by petitioners' counsel, as by another, which appears to be indirectly involved. Specifically, our concern is caused by a portion of the instructions of the District Court to the jury, reading as follows:

> "The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services, than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violation may be committed. Whether this is done by the exaction of additional fees by compulsion, *or by way of gratuity or tips*, or by any other device is of no materiality to the commission of the offense, if the compulsion, *or tip*, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater

> compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission." (Emphasis supplied.)

The above quoted language is susceptible to two interpretations. If the District Court meant to say that so long as an unlawful charge is established it is of no consequence that it is made to assume the guise of a tip or gratuity, then we have no quarrel with this statement. If, however, the words used can be construed as meaning that any tip or gratuity of whatever nature is unlawful if a passenger thereby pays out something in addition to the carrier's stated charge, then we disagree. Inasmuch as a bona fide tip always represents an additional payment in so far as the passenger is concerned, it follows that this interpretation of the act would prohibit railroad clerks generally from accepting tips, however innocent the intent of the parties might be, and the holiday box of cigars, or the "keep the change" gesture, would make the clerk criminally liable if he accepted.

We submit that under no proper interpretation of the Interstate Commerce Act can such a result be attained. We do not believe that the District Court meant to state any such doctrine of law, but inasmuch as the conclusion last mentioned can in fact be drawn from the language used, we feel that it is desirable for this Court to clarify the law in this regard, in the course of its proceedings in this case. Accordingly, this brief is devoted to establishing the proposition that a bona fide tip paid by a passenger to a railroad clerk securing traveling accommodations for such passenger cannot be considered as a violation of any provision of the Interstate Commerce Act.

ARGUMENT

Statutory Provisions Involved. The indictments underlying this action are predicated on the terms of Section 1 (5), Section 2, Section 3, and Section 6 (7), of the Interstate Commerce Act. Each of these sections (except Section 3) refers to "rates," "fares," "charges," or "compensation," and prohibits such of these as are unjust, unequal, or in excess of published tariffs. Section 3 of the Act refers to and prohibits the giving of "any undue or unreasonable preference or advantage" to any person. Obviously the mere giving and receiving of a bona fide tip could not, without more, constitute the giving of any such preference or advantage, so that this section is not a subject for consideration in this brief. Considering the language of the remaining sections, the question is that of whether such bona fide tip can constitute a "charge" or an item of "compensation" within the meaning of these and synonymous terms as used in the statute.

In developing our position, we will point out, first, the nature of a "charge,"* as that term is used in the Interstate Commerce Act, and second, the fundamental distinction between a charge and a bona fide tip.

What is a Charge? The word "charge" is one which has many meanings in the law. As used in connection with the practices of carriers, it clearly refers to an exaction made of the passenger or shipper as the result of a legal obligation or as a necessary prerequisite

*The words "rate," "fare," "charge," and "compensation," are all used in the various sections of the statute. No distinction in meaning appears to have been intended. The Interstate Commerce Commission has said: "'Rate,' 'fare' and 'charge,' broadly speaking, denote the compensation of the carrier." *Stopping of Cars in Transit to Complete Loading*, 37 I. C. C. 130, 132. We have used the single term "charge" in discussing this problem as being apparently the one most generally referred to in the cases.

to the rendition of the carrier's services. The word does not appear to be one to which the courts have given recent consideration, and in fact very few cases, old or new, have attempted to define it, presumably because its meaning was considered to be clear. The case of *Ballou vs. Hawaiian Tramways Inc.*, 10 Haw. 376, interpreted a local statute limiting the "charges" of certain carriers, and in an action brought under the statute, the court stated, in reference to the meaning of this word:

> "The essence of the meaning is that it is something required, exacted or taken from the traveler, as compensation for the services rendered."

In another case arising under the Interstate Commerce Act, Section 1 (5), the United States Circuit Court of Appeals for the Sixth Circuit, stated the following definition of the word "charges" in the course of its opinion:

> "This language, * * unquestionably uses the word 'charges' in the technical sense of segregated items of expense or dues, which are to be demanded by the carrier for any service in connection with transportation * *." (*Detroit, G. H. & M. vs. Interstate Commerce Commission*, 74 Fed. 803; affirmed 167 U. S. 633.)

The above two cases are the only ones which we have been able to discover which deal with this specific point. The conclusions reached, however, are so obviously in accord with the normal usage of language, that they may be relied upon as authoritative support for the proposition that a charge, properly so-called for the purposes of the Interstate Commerce Act, is an exaction, made by the party rendering some transportation service, which is of such a nature that if not paid, the service itself will not be rendered.

Distinction Between a Charge and a Tip. While the term "charge" is thus shown to connote an enforced payment, a tip is quite different. It essentially is a voluntary payment, given as a token of appreciation of services well performed. The fact that social usage has established that certain types of service always justify and almost require the giving of such tokens, does not change the essential nature of the tip itself. It may be withheld entirely, or varied in amount, according to the inclination of the donor, without legal liability.

The word "tip" is defined in the New International Dictionary as "a small gift of money, especially one to a servant or employee of someone else for a service done."

The legal status of tips has been considered in a number of cases. Generally, however, the issue involved has been that of whether they should be included in wages as computed in reference to various statutory provisions. See the case of *Williams vs. Jacksonville Terminal Company*, 315 U. S. 386, 404, for a summary statement of various statutes and the rulings which have been made thereunder. It has seldom been necessary to differentiate between a tip and a charge. Such a differentiation was made, however, in the case of *Restaurants and Patisseries Longchamps, Inc., vs. Pedrick*, 52 Fed. Supp. 174. This action was brought to recover sums alleged to have been wrongfully collected as employment taxes under the Federal Insurance Contributions Act. It appears from the opinion that the plaintiff operated a chain of restaurants and inaugurated the practice of abolishing all tipping in its establishments. As a substitute, it made provision for a regular service charge of ten per cent, to be added to each check. The proceeds of these service charges were paid to the employer, and the amount so collected was later apportioned among the employees. The plaintiff contended that these amounts were tips, but the court ruled to the contrary, saying:

"The word 'tip' is defined in Funk & Wagnalls' New Standard Dictionary as 'a sum of money given, as to a servant usually to secure better or more prompt service.' This connotes a voluntary act. A patron in a restaurant is under no compulsion to leave a 'tip.' In the instant case the voluntary aspect is completely eliminated. The customer is requested not to do it and the waiter would be subject to discipline if he accepted it.

"Section 402.228 of Regulations 106 provides: 'Tips or gratuities paid directly to an employee by a customer of an employer, and not accounted for by the employee to the employer' are excluded from wages for the purpose of the Federal Insurance Contributions Act.

"It seems clear, therefore, that the service charge in this case does not come within this exemption and constitutes wages for the purpose of the Act." (pages 174-175.)

A similar distinction was recognized in the case of *Harrison vs. Kansas City Terminal Railway Company*, 36 Fed. Supp. 434. This action was brought to collect wages alleged to be due to "red cap" employees under the Fair Labor Standards Act. The defendant had instituted a system whereunder it guaranteed to these workers the receipt of sums equal to the minimum wage provided by the statute, but credited all tips against this guarantee. It was argued that this practice was illegal by virtue of the Interstate Commerce Act because under it the tip would constitute a charge which was unlawful for lack of uniformity by virtue of Section 2 of the Statute. The court rejected this contention, saying:

"The gist of this argument is the erroneous assumption that to require the redcaps to turn in their tips is 'tantamount to making a charge to passengers for redcap service.' But the tips are voluntarily given by the patrons. The redcaps them-

selves do not make a charge. How can that which was not a charge be converted into a charge by the act of turning over the tip?" (page 440.)

It way be fairly concluded from the above authorities that the courts have recognized the existence of a clear line of distinction between a charge and a tip, the distinction being that drawn between a positive exaction and a gratuity, however much the bestowal of the latter may be dictated by social usage. Inasmuch as the Interstate Commerce Act refers to charges, and charges only, in the prohibitions of Section 1 (5), 2 and 6 (7), we submit that there is nothing in the language of this statute which precludes the taking of a bona fide tip by a railroad employee.

General Considerations In addition to the fact that the statutory language does not establish any prohibition of the taking of tips, there is the added fact that such a doctrine of law would lead to results which are essentially inequitable.

Many railroad employees are put in such contact with the public that the practice of tipping has been a natural result. In some instances, these employees are made available for the performance of extra services which are not essential items of transportation, but which some members of the traveling public may desire. In this category red caps and dining car waiters may probably be placed, at least as to most of their services. Other employees, however, perform essential parts of the transportation operation. Pullman cars, for example, could scarcely be operated without the services of porters to prepare berths for night or day use. For these services it has become customary to confer a tip. While extra services may justify an increase in the amount, the basic tip to such employees is distinctly for services within the limits of the carrier's duties. Is it to be held that such basic tips constitute

"charges" over and above those permitted by applicable tariffs and hence that their acceptance is criminal?

The clerk behind the ticket counter is undoubtedly performing an essential part of the transportation business. Frequently customers have numerous or difficult problems of transportation to present to such employees. If their requests are handled with unusual efficiency, they often, though by no means always, express their appreciation by some favor to the clerk with whom they deal. It may be that the passenger hopes thereby to insure for himself similar consideration at some other time or he may have no such future transaction in mind. Almost certainly a refusal of his token of appreciation would be resented. Are we to conclude, however, that such a refusal is required in all cases, if the clerk is to avoid criminal prosecution?

We do not contend that if an unlawful payment is disguised as a tip such disguise should save it from attack. It would be highly improper, however, to condemn all tips as illegal because it might be contended that some have been or could be used to accomplish an improper purpose.

Summary. We do not by the above contentions mean to concede that it has been established that the petitioners have violated any section of the Interstate Commerce Act. As we have above indicated, that point is being presented by petitioners' own counsel. Our purpose here is merely to call to the Court's attention the possible interpretation of the legal principles enunciated by the trial court, principles which might have a far-reaching and damaging effect totally outside the contemplation of the Interstate Commerce Act. In this connection, we have pointed out that there is an essential difference between a charge and a tip, and that the statute could not have intended to forbid the taking of all tips by carrier employees generally or by railroad clerks in particular. Hence, we

submit that this court should hold that bona fide tips are not within the prohibition of the Act.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1945.

Stanley Howitt, Flora Post Lee, James Dewhurst, and Terence P. O'Rourke, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 6, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The wartime transportation shortage during the winter of 1943 made it exceedingly difficult to obtain tickets for trains going north from Miami, Florida. Petitioners are three ticket sellers and one diagram clerk who were employed at that time by a railroad at Miami. Petitioners Howitt, Lee, and Dewhurst were charged with, and convicted for, conspiracy to violate the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, in that they conspired to collect and receive unjust and unreasonable charges for passenger transportation in violation of Section 1 (5)[1]; to receive and collect greater compensation for service from certain persons than that which would be collected from others, in violation of Section 2; to prefer particular persons to the disadvantage of others in violation of Section 3 (1); and to collect and receive compensation in excess of that fixed by tariff schedules in violation of Section 6 (7). These violations are made a crime by Section 10[2]. Petitioner O'Rourke was charged with and convicted for committing

[1] Section 1 reads in part as follows:

"Any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing so directed or required to be done in part to be done or to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein shall be deemed guilty of a misdemeanor . . . ."

substantive offenses of the same nature.[2] The Circuit Court of Appeals affirmed. 150 F. 2d 82. We granted certiorari because this case raises important questions concerning the scope of the Act.

The government charged that there was a working agreement between petitioners and certain local hotel employees under which persons anxious to purchase railroad tickets would, in order to obtain them, pay amounts in excess of published rates either to petitioners directly, or to the hotel employees who in turn would divide the excess payments between themselves and petitioners. The railroad played no part in these transactions. The government produced a great deal of evidence to support these charges.[3] Petitioners offered no testimony or other kind of evidence to contradict that produced by the government.[4] Their only contention was raised on demurrer, motion for directed verdict and exception to the charge of the jury. This contention, urged on several different grounds, was that the indictment failed to charge, and

[2] Ordinary violations of the Act are under Section 10 punished only by imposition of a fine. But a proviso imposes a prison term if the violation consists of an unlawful discrimination. Petitioner O'Rourke contends that he was charged only with violating Section 3 (7) rather than Section 2; which is the unlawful discrimination section and that he therefore could not be imprisoned under Section 10. This contention is frivolous. The O'Rourke indictment clearly and explicitly also charges a violation of Section 2.

[3] An amicus brief filed with us contains the suggestion that a rather extensive paragraph of the Court's charge to the jury, to which exception was noted, contains language susceptible of the construction that acceptance of a "bona fide tip" might constitute a violation of the Interstate Commerce Act. We think that that language read in its context does not relate to bona fide tips but rather to excess charges which the prospective passenger was forced to pay and which were made to look like tips. Moreover, this paragraph of the charge also contains instructions that employees acting alone without participation by the railroad might be found guilty of violating the Act. The exception to the paragraph was a general one. In view of what petitioners argue here, what they argued on demurrer, and on the motion for directed verdict, it is likely that the exception was directed to these last mentioned instructions and not to the language challenged by the amicus brief. Indeed, petitioners introduced no evidence to show that they were receiving bona fide tips, nor did they request any charge on the basis of this theory. If petitioners in excepting to the challenged paragraph of the charge had the "bona fide" tip question in mind they should have specifically pointed this out to the trial court. See Allis v. United States, 155 U. S. 117, 121-123. The issue raised by the amicus brief as to whether the Act covers bona fide tips is therefore not before us.

[4] The Circuit Court of Appeals said that this evidence "proved beyond question that the defendants repeatedly and systematically took advantage of the prevailing wartime congestion in transportation to exact from applicants for accommodations more money than the regular rate prescribed and appropriated the difference to themselves."

the evidence failed to establish a crime, since the Interstate Commerce Act and Section 10 in particular are primarily aimed at railroads and do not make discriminatory and illegal charges by railroad employees for passenger transportation criminally punishable, unless the railroad is itself a party to the conduct. This is still the basis of petitioners' arguments.

It is well established that one of the primary aims of the Interstate Commerce Act and the amendments to it was to establish uniform treatment of users of transportation facilities. See *Mitchell v. United States*, 313 U. S. 80, 94, 95. The Act again and again expressly condemns all kinds of discriminatory practices. Railroad employees can accomplish invidious transportation discrimination, whether or not their conduct is approved or participated in by their superiors. Not only do the Act's provisions against discrimination and special favors fail to exempt employees such as petitioners; but section 10 standing alone shows the clearest possible purpose to bar all railroad employees from overcharging for their own or for the railroad's illegitimate gain. The Interstate Commerce Act imposes the same duty on ticket sellers and clerks of common carriers as that imposed on railroad officers or other employees, to treat all the public alike as to the terms and conditions of transportation. Railroad accommodations are thus not to depend upon who will or can pay more because of greater need or a longer purse. See *United States v. Estes*, 6 Fed. 2d 902, 905.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.